95

Supreme Court, U.S.
FILED

071559 MAY 28 2008

OFFICE OF THE CLERK

No. 07

In the Supreme Court of the United States

M.M., by and through her parent, L.R.,
Petitioners,

v.

Special School District No. 1, Minneapolis,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Margaret O'Sullivan Kane
Counsel of Record
KANE EDUCATION LAW, LLC
1654 Grand Avenue
Suite 200
Saint Paul, Minnesota 55105
(651) 222-8611

Attorney for Petitioners

2008 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

Questions Presented

1. Are states entitled to legislatively assign the burden of proof in special education administrative hearings?

2. Are the results below, adopting the default rule despite a state statute assigning the burden of proof to the school districts, consistent with this Court's decision in *Schaffer v. Weast ex rel Weast* , 546 U.S. 49, 126 S.Ct. 528 (2005)?

3. Does the Supreme Court's decision in *Schaffer v. Weast ex rel Weast* , 546 U.S. 49, 126 S.Ct. 528 (2005) stand for the conclusion that the American default burden of proof rule applies despite a state statute to the contrary?

4. Did the court below properly apply the standard of review for special education administrative decisions and district court decisions?

Table of Contents

Questions Presented for Review i

Table of Contents ii

Table of Authorities iv

Citations of Opinions and Orders 1

Basis for Jurisdiction in this Court 2

Statutory Provisions Involved 2

Statement of the Case 2

Argument Supporting Allowance of Writ 4

I. The Right to Educate Citizens is Primarily the Provenance of the States Save for the Rights and Liberties Guaranteed by the federal Constitution and federal laws 4

II. The Minnesota State Legislature Has Statutorily Assigned the Burden of Proof to School Districts Thus Rendering Inapplicable this Court's Decision in *Schaffer v. Weast*... 9

III. Other Circuit Courts Have Misapplied *Schaffer v. Weast*..... 11

IV. The Eighth Circuit Court of Appeals Declined to Apply the Requisite Standard of Review for Administrative and District Court Decisions. 12

Conclusion 21

Appendix

The published decision *per curiam* decision denying Petitioners' petition for re-hearing and re-hearing *en banc* on 28 February 2008, affirming the Eighth Circuit Court of Appeals panel decision A-1

The published decision of the United States Court of Appeals for the Eighth Circuit in *Special School District No. 1, Minneapolis v. M.M., et al.*, decided on 4 January 2008 reversing the District Court's decision granting summary judgment in favour of the Petitioners A-2

The published decision of the United States District Court for the District of Minnesota in *Special School District No. 1, Minneapolis v. M.M., et al.*, (Civil File No. 05-2270), decided on 18 July 2006, granting the Petitioners' motion for summary judgment A-22

The unpublished decision on 1 September 2005 by the Administrative Law Judge appointed by the Minnesota Department of Education, granting the Petitioners the relief requested through the special education administrative hearing A-108

Table of Authorities

United States Supreme Court Cases

Schaffer v. Weast ex rel Weast,
546 U.S. 49, 126 S.Ct. 528 (2005) ..... *passim*

Cummings v. County Board of Education,
175 U.S. 528, 20 S.Ct. 197 (1899) 5

Town of Burlington v. Dept. of Educ. Com. of Mass,
736 F.2d 773, 785 (1st Cir. 1984), *aff'd sib nom.*,
471 U.S. 359 (1985) 8

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982) 12-13, 13, 14

Honig v. Doe, 484 U.S. 305 (1988) 17

United States Circuit Court of Appeals Cases

Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett,
440 F.3d 1007 (8th Cir. 2006) 8, 9

Taylor v. Vermont Dept. of Educ.,
313 F.3d 768, 777 (2d Cir. 2002) 8

Blackmon v. Springfield R-XII School Dist.,
198 F.3d 648, 658 (8th Cir. 1999) 9, 10

E.S. v. Indep. Sch. Dist. No. 196,
135 F.3d 566, 569 (8th Cir. 1998) 9, 10

Fairfax County School Bd. v. Knight,
261 Fed. Appx. 606, 608, 2008 WL 152571, (4th Cir. 2008) 11

County Sch. Bd. v. Z.P.,
399 F.3d 298 (4th Cir.2005) 11

M.H. ex rel. A.H. v. Monroe-Woodbury Cent. School Dist., 250 Fed. Appx. 428 (2nd Cir. 2007) 11

R.B., ex rel. F.B. v. Napa Valley Unified School Dist.,
496 F.3d 932 (9th Cir. 2007) 11

Board of Educ. of Tp. High School Dist. No. 211 v. Ross, 486 F.3d 267 (7th Cir. 2007) 11

Gill v. Columbia 93 Sch. Dist.,
217 F.3d 1027 (8th Cir. 2000) 15

Indep. Sch. Dist. No. 284 v. A.C.,
258 F.3d 769 (8th Cir. 2001) 18

United States District Court Cases

Briggs v. Elliott,
98 F.Supp. 529, 532 (Dist. S.C. 1951) 4, 5

Pink v. Mt. Diablo Unified Sch. Dist.,
738 F.Supp. 345, 346 (N.D. Calif. 1990) 8

Independent School Dist. No. 701, Hibbing Public Schools, v. J.T., 2006 WL 517648 (D.Minn.2006) 9

Federal Statutes and Regulations

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

20 U.S.C. § 1415 5

20 U.S.C. § 1415(j) 17

20 U.S.C. § 1415(k) 17

34 C.F.R. § 300.519 17

34 C.F.R. § 300.520 17

State Statutes and Rules

Minn. Stat. § 125A.091, subd. 16 ..... *passim*

Revised Supreme Court Rule 13.3..... 2

Citations of Opinions and Orders

The published decision *per curiam* decision denying Petitioners' petition for re-hearing and re-hearing *en banc*, affirming the Eighth Circuit Court of Appeals panel decision, is set forth in Appendix hereto (App. 1).

The published decision of the United States Court of Appeals for the Eighth Circuit in *Special School District No. 1, Minneapolis v. M.M., et al.*, decided on 4 January 2008 reversing the District Court's decision granting summary judgment in favor of the Petitioners, is set forth in Appendix hereto (App. 2).

The published decision of the United States District Court for the District of Minnesota in *Special School District No. 1, Minneapolis v. M.M., et al.*, (Civil File No. 05-2270), decided on 18 July 2006, granting the Petitioners' motion for summary judgment, is set forth in the Appendix hereto (App. 22).

The unpublished decision on 1 September 2005 by the Minnesota Department of Education appointed Administrative Law Judge granting the Petitioners the relief requested through the special education administrative hearing is set forth in the Appendix hereto (App. 108).

Basis for Jurisdiction in this Court

The decision of the Eighth Circuit Court of Appeals reversing the United States District Court's decision granting Petitioners' motion for summary judgment was entered on 4 January 2008 (App. 2); and its order denying the Petitioners' timely filed petition for re-hearing and for re-hearing *en banc* was filed on 28 February 2008 (App. 1). This petition for writ of certiorari is filed within ninety (90) days of the date of the Court of Appeal's denial of petitioners' timely filed petition for re-hearing and re-hearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Statutory Provisions Implicated by this Petition:

Minn. Stat. § 125A.091, subd. 16

Statement of the Case

Petitioners brought a special education administrative hearing on 16 May 2005 which resulted in a favorable decision for the Petitioners on 1 September 2005. The state appointed Administrative Law Judge ("ALJ") concluded, after multiple days of hearing, that the Respondent violated Petitioners' right to a free appropriate public education in the least restrictive environment in violation of the Individuals with Disabilities Education Act ("IDEA"). As a result of this conclusion, Petitioners received an order requiring

Respondents to convene an IEP team meeting to design an individualized education program that was consistent with up-to-date information, recommendations from the independent educational evaluators and with direct service minutes designated to specific areas of need. The ALJ also ordered the Petitioner's behavior intervention plan be modified consistent with the recommendations by the IEP team and, moreover, that the modifications include consideration of a change to the city-wide disciplinary policy. Finally, the ALJ ordered compensatory education services in the amount of 188 hours for past deprivations.

The Respondent appealed the ALJ decision to the United States District Court, which adopted the Magistrate's Report and Recommendation. The Report and Recommendation upheld the ALJ decision with nominal exceptions to the amount of compensatory education services to be awarded to the Petitioners.

The Respondent appealed the District Court's decision to the Eighth Circuit Court of Appeals, which reversed the District Court's decision, finding that: 1) the United States Supreme Court's decision in *Schaffer v. Weast ex rel Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005) stands for the default rule despite Minnesota's statutory assignment of the burden of proof to the school district; and 2) the ALJ and the United States District Court facts on the administrative record supporting the denial of a free appropriate public education were in error, as was the application of the standard for a denial of a free appropriate public education.

Petitioners sought a re-hearing and re-hearing *en banc*, which were denied on 28 February 2008, with three justices agreeing to grant the petition for re-hearing *en banc*.

Argument Supporting Allowance for Writ

I. The Right to Educate Citizens is Primarily the Provenance of the States Save for the Rights and Liberties Guaranteed by the federal Constitution and federal laws.

As the district court in South Carolina in its 1951 decision in *Briggs v. Elliott,* 98 F.Supp. 529, 532 (Dist. S.C. 1951), citing Supreme Court language, eloquently stated:

> One of the great virtues of our constitutional system is that, while the federal government protects the fundamental rights of the individual, it leaves to the several states the solution of local problems. In a country with a great expanse of territory with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities as well as to the strength and unity of the country as a whole. It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power, i.e. the power to legislate with respect to the safety, morals, health and general

> welfare. *And in no field is this rights of the several states more clearly recognized than in that of public education.* As was well said by Mr. Justice Harlan, speaking for a unanimous court in *Cumming v. County Board of Education*, 175 U.S. 528, 545, 20 S.Ct. 197, 201 (1899) 'while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.'

Briggs at 532, citing *Cumming v. County Board of Education*, 175 U.S. 528, 545, 20 S.Ct. 197, 201 (1899) (Emphasis added).

This field of rights and obligations in public education as articulated in *Cumming* continues to apply not only to education in general, but also to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.* in specific. The IDEA specifically sets a procedural and substantive floor for which states are responsible in order to receive federal funding. 20 U.S.C. § 1415.

As this Court in the very decision that has given rise to the present controversy asserted:

> IDEA is "frequently described as a model of 'cooperative federalism.' " *Little Rock School Dist. v. Mauney,* 183 F.3d 816, 830 (8th Cir.

> 1999). It "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley,* 458 U.S. 176, 183, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

Schaffer v. Weast ex rel Weast , 546 U.S. 49, 126 S.Ct. 528, 531-32 (2005). The IDEA specifically lacks the imposition of the burden of proof. This Court examined in *Schaffer* the assignment of the burden of proof for those states with no specific statutory assignment. This Court specifically and carefully declined to examine the issue of a statutorily assigned burden of proof. As this Court stated:

> We granted certiorari, 543 U.S. 1145, 125 S.Ct. 1300, 161 L.Ed.2d 104 (2005), to resolve the following question: At an administrative hearing assessing the appropriateness of an IEP, which party bears the burden of persuasion?

Id. at 533. This Court in reaching the conclusion that the "normal default rule applies" specifically declined to examine those states which had overridden the default rule and statutorily assigned the burden of proof to the school district:

> Several States have laws or regulations purporting to do so, at least under some circumstances. See, *e.g.*, Minn. Stat. § 125A.091, subd. 16 (2004); Ala. Admin. Code

> Rule 290-8-9-.08(8)(c)(6) (Supp.2004); Alaska Admin. Code, tit. 4, § 52.550(e)(9) (2003); Del.Code Ann., Tit. 14, § 3140 (1999). Because no such law or regulation exists in Maryland, we need not decide this issue today.

Schaffer at 537. Despite this clear statement that such a state override of the default rule was not being decided, the court below erroneously concluded that *Schaffer* stood for proposition the default rule applies in special education administrative hearings without consideration to a state's legislative override of the default rule. *App. 4-5.*

The Supreme Court took pains to decline to consider the burden of proof wherein a state specifically assigned the burden:

> Finally, respondents and several States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. Several States have laws or regulations purporting to do so, at least under some circumstances. See, *e.g.*, Minn.Stat. § 125A.091, subd. 16 (2004); Ala. Admin. Code Rule 290-8-9-.08(8)(c)(6) (Supp.2004); Alaska Admin. Code, tit. 4, § 52.550(e)(9) (2003); Del.Code Ann., Tit. 14, § 3140 (1999). Because no such law or regulation exists in Maryland, we need not decide this issue today. Justice BREYER contends that the allocation of the burden ought to be left *entirely* up to the States. *But neither party made this argument before this Court or the courts below. We therefore decline to address it.*

> We hold no more than we must to resolve the case at hand . . .

Schaffer v. Weast, 546 U.S. at 61-62 (emphasis added).

Despite this clearly articulated caution, the court below usurped the state Legislature's authority, under the IDEA's doctrine of cooperative federalism, by elevating *dicta* in a footnote in an Eighth Circuit decision (*Renollett*)[1], in which the Minnesota state statute assigning the burden of proof was neither considered nor examined as controlling authority.

The IDEA consists of "skeletal federal provisions designed as minimum standards" for the education of children with disabilities. *Pink v. Mt. Diablo Unified Sch. Dist.*, 738 F.Supp. 345, 346 (N.D. Calif. 1990) *quoting Town of Burlington v. Dept. of Educ. Com. of Mass*, 736 F.2d 773, 785 (1st Cir. 1984), *aff'd sub nom.*, 471 U.S. 359 (1985). In passing the IDEA:

> Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states. States are responsible for filing in the numerous interstices with the federal Act through their own states and regulations.

Burlington, 736 F.2d at 785; *Taylor v. Vermont Dept. of Educ.*, 313 F.3d 768, 777 (2nd Cir. 2002).

---

[1] *Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007 (8th Cir. 2006).

II. The Minnesota State Legislature Has Statutorily Assigned the Burden of Proof to School Districts Thus Rendering Inapplicable this Court's Decision in *Schaffer v. Weast.*

The Minnesota state Legislature statutorily assigned the burden of proof to school districts. Minn. Stat. § 125A.091, subd. 16 states:

> **Burden of proof.** The burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment. . .

Prior to the decision in *Schaffer v. Weast ex rel Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005), the Eighth Circuit Court of Appeals determined that the burden of proof at administrative due process hearings was properly assigned to school districts. *Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648, 658 (8th Cir 1999), *rehearing denied* 2000, citing *E.S. v. Ind. Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). This was affirmed in 2006 by the United States District Court in its decision *Independent School Dist. No. 701, Hibbing Public Schools, v. J.T.*, 2006 WL 517648, *6, n. 6 (D.Minn. 2006)(unpublished).

Nevertheless, the Eighth Circuit's opinion determined that *dicta* found in a footnote in *Board of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007 (8th Cir. 2006) was controlling. The *dicta* footnote stated:

> In *Schaffer ex rel. Schaffer v. Weast*, the Supreme Court held that the burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district. 546 U.S. 49, ----, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005). At the time of the administrative proceedings in this case, however, the law in our Circuit placed the burden on the school district. *E.g. Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir.1999); *E.S. v. Indep. Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). Here, Josh sought relief, and the burden of persuasion was placed on the District. In light of *Schaffer*, it was error to place the burden on the District, but the error was harmless because the District prevailed.

Renollett, at 1010, n. 3. With all due respect to the *Renollett* decision, the footnote without consideration to the statutory assignment of the burden of proof or the Supreme Court's refusal to determine such a statutory assignment in *Schaffer*, appears to be a throw-away line which, as the footnote identifies, is not related to the decision. As such it is *dicta* and not controlling.

The district court below was correct when it concluded in its Report and Recommendation:

> As a Court of inferior jurisdiction, we do not disregard the guidance of our Court of Appeals, even if the guidance is expressed in *dicta*. However, given the absence of any discussion

> concerning the Minnesota statutory framework, or the Supreme Court's express decision not to address a State's authority to statutorily assign the burden of proof, we are unable to attribute to the Court's analysis, in *Renollett*, an intention to extend the rule in *Schaffer* to situations where the State has specifically allocated the burden of proof by statute.

App. 56.

III. Other Circuit Courts Have Misapplied *Schaffer v. Weast.*

Those circuit courts which have had the opportunity to review the *Schaffer* decision have summarily concluded that *Schaffer* stands for the conclusion that the default rule applies without consideration to any state statute assigning the burden of proof. See *Fairfax County School Bd. v. Knight*, 261 Fed. Appx. 606, 608, 2008 WL 152571, *1 (4th Cir. 2008) (concluding that *Schaffer v. Weast* "stands for the proposition that the party challenging the IEP has the burden of proof"); *County Sch. Bd. v. Z.P.*, 399 F.3d 298, 309 & n. 7 (4th Cir. 2005); *M.H. ex rel. A.H. v. Monroe-Woodbury Cent. School Dist.*, 250 Fed. Appx. 428 (2nd Cir.2007) ("holding that the burden of proof in an IDEA impartial hearing rests on the party seeking relief"); *R.B., ex rel. F.B. v. Napa Valley Unified School Dist.*, 496 F.3d 932, 939 (9th Cir. 2007) ("party seeking IDEA relief bears burden of persuasion"); *Board of Educ. of Tp. High School Dist. No. 211 v. Ross*, 486 F.3d 267, 279-71 (7th Cir. 2007)("We note as well that at the administrative

level, the Supreme Court has held that the burden of proof in a hearing challenging an educational placement decision is on the party seeking relief."). See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 531 (2005). With the exception of the case before the Court, no other circuit court of appeals has addressed the application of *Schaffer* wherein a state statute has assigned the burden of proof to school districts.

It is difficult to comprehend how such learned colleagues and courts could miss this Court's carefully crafted exception in its *Schaffer* decision and adopt without consideration to the exception the conclusion that the default rule applies. No reference to the exception appears in the decisions, just as it appears minimally in the decision below.

IV. The Eighth Circuit Court of Appeals Declined to Apply the Requisite Standard of Review for Administrative and District Court Decisions.

The Eighth Circuit Court of Appeals disregarded the standard of review, cherry-picked facts, and misapplied the law to support its reversal of the administrative and district court decision. Given the significant findings and conclusions reached by the administrative law judge and the district court, unraveling the errors in law and fact requires more space than is permitted. Consequently, Petitioners' must necessarily rely upon the record before this Court and specific examples to illuminate the errors.

In its seminal decision *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S.

176 (1982), the Supreme Court rejected the petitioners' contention that the courts are given limited authority to review the state's procedural compliance under the Act and that the courts had no power to review the substance of the state program. *Id.* at 205. The Court explained that "Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts" and, instead, decided "that courts were to make independent decision[s] based on a preponderance of the evidence." *Id.* at 205-06. (Citations omitted).

On the other hand, the Court cautioned reviewing courts not to adopt a "free hand to impose substantive standards of review which cannot be derived from the Act itself." *Id.* at 206. "[T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the court to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.* Therefore, the Court reasoned, the requirement "that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to those proceedings." *Id.*

From the *Rowley* case itself, courts, on pure questions of law, are to interpret the statute when the statute expressly defines the substantive provision in question. *Rowley*, 458 U.S. at 187. However, on substantive issues not defined in the Act, but requiring interpretation of educational policy, reviewing courts are to give "due weight" to the determinations of the administrative proceedings. *Id.* at 206.

A. The Standard of Review for Special Education Administrative and District Court Decisions.

The standard of review in the Eighth Circuit for the appeal of administrative and district court special education decisions is:

> Because judges are not trained educators, judicial review under the IDEA is limited. When reviewing outcomes reached through the administrative appeals procedures established by 20 U.S.C. §§ 1415(b) and (c), the district court must give "due weight" to the results of those proceedings, resisting any impulse to "substitute [its] own notions of sound educational policy for those of the school authorities." *Rowley,* 458 U.S. at 206, 102 S.Ct. at 3051. At the appellate level, the question of an IEP's adequacy is a mixed question of law and fact, reviewed de novo. *See Fort Zumwalt Sch. Dist. v. Clynes,* 119 F.3d 607, 611 (8th Cir. 1997). In the absence of a mistake of law, the district court's answer to this mixed fact/law question is reviewed for clear error. *See Yankton Sch. Dist. v. Schramm,* 93 F.3d 1369, 1374 (8th Cir. 1996). At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA. *See Clyde K. v. Puyallup Sch.*

> *Dist. No.3,* 35 F.3d 1396, 1398-99 (9th Cir. 1994). On appeal, the party challenging the outcome of state administrative hearings has the burden of proof. *See id.; Board of Educ. of Community Consolidated Sch. Dist. No. 21 v. Illinois State Bd. of Educ.,* 938 F.2d 712, 716 (7th Cir. 1991).
>
> Whether an IEP is reasonably calculated to provide some educational benefit is a mixed question of law and fact and our review is de novo, *Fort Zumwalt Sch. Dist. v. Clynes,* 119 F.3d 607, 611 (8th Cir.1997), *cert. denied,* 523 U.S. 1137, 118 S.Ct. 1840 (1998), although the district court's findings of fact are binding unless clearly erroneous. *Yankton Sch. Dist.* 93 F.3d at 1374.

Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027,1035 (8th Cir. 2000). In this case, the court below overturned the district court by misapplying the law, cherry-picking the facts, and, consequently, erroneously concluding clear error in the district court decision. This was accomplished by overturning the district court's decision against the weight of the evidence in the record and without according the administrative decision the due weight required under the review standard.

The case law that has evolved from the IDEA in this Court and the Supreme Court of the United States establishes a unique standard of review for special education administrative decisions, as well as

decisions from the district courts. Unfortunately, the Eighth Circuit Court of Appeals utterly disregarded this unique standard and, notably, cited no standard of review by which it was being guided. Instead, the lower court did precisely that which this unique standard of review cautions against – supplanted its own notions of sound educational policy in the stead of the school authorities, which includes the special education administrative hearing system. Notable is the significant time devoted by the lower court to the "misdeeds" of the child rather than her educational needs.

B. The Lower Court Misapplied the Law and the Facts.

By substituting its own notions of sound educational policy, the lower court's opinion misunderstood and misapplied the most fundamental legal tenets found in the law. The lower court's opinion clearly focused significant space and time on the misbehavior of the child rather than on the legal obligations to such students under the law. This misapplication of the law and limited view of the facts is evident in the follow examples:

1. The lower court incorrectly concluded that a pattern of suspensions was not a change in placement violative of the stay-put provision under the IDEA.

2. The lower court incorrectly concluded that the parent rejected Barton Open when

> the record reflects it was, in fact, never offered.

The lower court's opinion correctly cites the legal conclusion from *Honig v. Doe*, 484 U.S. 305 (1988) that a suspension of *less than* 10 days does not constitute a unilateral change in placement. *App. at 15.* However, the lower court's opinion went astray when it concluded as follows:

> The ALJ concluded that the District violated this duty by failing to provide M.M. educational services during the days she was suspended between January and April 2005, ignoring the undisputed fact that L.R. rejected the District's offers of home schooling services during this period.

App. at 15-16. In reaching this conclusion, the Eighth Circuit panel substituted its own notions of what should take place between parents and schools, i.e., an agreement for alternative services, in doing so seriously misunderstood that the suspensions in excess of 10 days from her stay-put represent a *unilateral* change in placement no matter the alternative services offered. The lower court did not understand that suspensions in excess of ten days trigger very specific procedural safeguards under the IDEA that must be followed. 20 U.S.C. §§ 1415(j); 1415(k); 34 C.F.R. §§ 300.519; 300.520. In this case, the offer of alternative services, determined inappropriate to meet the needs of the student, i.e.,

"home-schooling"[2](sic) services, directly contradicts the child's right to an education in the least restrictive environment. As reflected in the administrative decision, home bound instruction is the most restrictive education services available under the IDEA and was rejected by the parent for that purpose. *App. 133, ¶ 53.* The history of the IDEA is predicated on keeping children in the education environment and not relegating them to institutions or home, thus severing contact with their peers. See, *Independent School Dist. No. 284 v. A.C.*, 258 F.3d 769, 778-79 (8th Cir. 2001).

As the ALJ correctly found:

> The student was suspended for approximately 38 days during the 2004-05 school year. The repeated suspensions of the student for periods of less than 10 days between January 2005 and April 2005 constitute a pattern because they cumulate to approximately 30 days and because the length of each removal, the total amount of time the student was removed, and the proximity of the removals to one another. These suspensions constitute a change in placement made by the district without the consent of the parent, in violation of 20 U.S.C. § 1415(f).

---

[2] The Panel refers to "home-schooling" when the offer of services was "homebound instruction," a significant difference under the law, as the former is delivered by the parents and the latter is delivered by the school.

App. 145, ¶ 11.

As previously noted, the lower court cherry-picked facts from the administrative record in what appears to be a concerted efforts to create the appearance of a child far more dangerous than the record would, in fact, support. For example, the lower court wrote that "M.M. almost immediately incurred a *five*-day suspension for using mace in a *fight with another student*." *App. at 18* (emphasis added). The lower court is in clear factual error in that the administrative record itself reflects that "the student was suspended for *four* days for *having a can of mace at school*, refusing to turn it over to district staff, and assaulting the administrator who tried to take it from her." *App. 127, ¶ 38* (emphasis added).

The lower court also incorrectly cites the administrative record when it found:

> The March 28, 2005, mediation agreement provided that L.R. would promptly visit Barton to learn about its Setting III program. L.R. made an informal visit and few days later, talked to one teacher, told the District that the Barton program was unacceptable, and later refused to reconsider her decision. With the parent having adamantly rejected a Setting III placement at Barton, the District did not violate the IDEA by failing to offer this placement "formally" before the due process hearing . . .

App. 19-20.

The administrative record reflects the confusion regarding the offer of the Barton program and the Parent's visit as follows:

> At this meeting [January 18, 2005](*App.125-26,* ¶ 35), the parent learned that the district had another SPAN program for middle school girls at Barton Open School, which the parent wanted to see. The social worker attempted to set up an informational meeting there, but the district refused to do so because there were no openings at Barton.

App. 126, ¶36. The District, according to the administrative record, continued to offer the Jordan Park program throughout the events leading up to the hearing, an offer the IEP team had agreed was inappropriate. *App. 125-26, 129,* ¶¶*35, 40.* This situation led the administrative law judge to correctly conclude:

> It is not clear whether there was ever an opening at the Barton SPAN program or whether such a placement was offered to the parent before the hearing.

App. 130-31, ¶ *47.*

Nevertheless, in direct contradiction to the facts in the administrative record, the lower court imprecates the parent for not accepting a placement

at Barton Open: again the record reflects that the Administrative Law Judge was unable to determine if it was ever offered.

The lower court's opinion is replete with examples of these kinds of misapplication and misinterpretation of the facts and law in this case creating what appears to be a retrospective marshalling of the facts and law in order to support a decision *fait accompli.*

Conclusion

For all the reasons and arguments stated herein, a writ of certiorari should issue to review and vacate the judgment in the Eighth Circuit Court of Appeals, remanding the matter back to the Eighth Circuit Court of Appeals to reinstate the District Court's decision.

Respectfully submitted,

Dated: 28 May 2008

Margaret O'Sullivan Kane
Kane Education Law, LLC
1654 Grand Avenue
Suite 200
Saint Paul, Minnesota 55105
651/222-8611

Attorney for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-3572

M.M., by and through her parent and natural guardian, L.R.,
Appellee

v.

Special School District No. 1, Minneapolis, Minnesota and Minneapolis Board of Education, Appellants

- - - - - - - - - - - -

Minnesota School Boards Association,
Amicus on Behalf of Appellant
Minnesota Disability Law Center,
Amicus on Behalf of Appellee

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:05-cv-02270-RHK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judges Bye, Colloton and Gruender would grant the petition for rehearing en banc.

February 28, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3572

M.M., by and through her parent and natural guardian, L.R.,

Plaintiff - Appellee,

v. Appeal from the United States District Court for the District of Minnesota.

Special School District No. 1, et al.,
Defendants - Appellants.

Minnesota School Boards Association,

Amicus on Behalf of Appellants.

Submitted: April 2, 2007
Filed: January 4, 2008

Before LOKEN, Chief Judge, BEAM and RILEY, Circuit Judges.

LOKEN, Chief Judge.

M.M. is a child with educational disabilities who attends Minneapolis public schools in Minnesota's Special School District No. 1 (the District). The Individuals with Disabilities Education Act (IDEA) provides that M.M. is entitled to a free appropriate public education (FAPE) that includes special education and related services tailored to her unique needs. See 20 U.S.C. §§ 1400(d)(1)(A), 1401(14). In May 2005, dissatisfied with the results of a mediation agreement, M.M.'s parent, L.R., requested a due process hearing under IDEA and state law. See 20 U.S.C. § 1415(f); Minn. Stat. § 125A.091, subd. 12-14. L.R. alleged that the District had imposed suspensions, exclusions, and administrative transfers that denied M.M. her right to a FAPE during the 2003-2004 and 2004-2005 school years.

After a hearing, the state Administrative Law Judge (ALJ) determined that the District violated the IDEA in both school years and awarded 188 hours of compensatory educational services. M.M. then filed this action seeking an award of costs and attorney's fees. See 20 U.S.C. § 1415(i)(3)(B). The District filed a counterclaim, challenging the ALJ's decision. The district court reduced the compensatory services award by eight hours and awarded M.M. substantial costs and attorney's fees. M.M. v. Special Sch. Dist. No. 1, No. 05-2270, 2006 WL 2571229 (D. Minn. Sept. 5, 2006). The District appeals. Reviewing the district court's ultimate determination that M.M. did not receive a FAPE *de novo*, we reverse. See CJN v. Minneapolis Pub. Sch., 323 F.3d 630, 637 (8th Cir.), cert. denied, 540 U.S. 984 (2003) (standard of review).

I. The Burden of Proof Issue

Consistent with Minnesota law, the ALJ ruled that the District must prove, "by a preponderance of the evidence, that it is complying with the law and offered or provided a [FAPE] to the child in the least restrictive environment." Minn. Stat. § 125A.091, subd. 16. Following the hearing, the Supreme Court held that, if state law is *silent*, the burden of persuasion in an IDEA proceeding lies with the party seeking relief, here, M.M. Schaffer v. Weast, 546 U.S. 49 (2005). The Court declined to decide whether this rule would apply in States such as Minnesota that explicitly assign the burden elsewhere. Id. at 61-62. However, we subsequently held that it was error to assign the burden of persuasion to a Minnesota school district in an action to enforce the procedural and substantive requirements of the IDEA. School Bd. of I.S.D. No. 11 v. Renollett, 440 F.3d 1007, 1010 n.3 (8th Cir. 2006).

Though Schaffer and Renollett were decided after the due process hearing, they apply to this pending case. See Harper v. Va. Dept. of Taxation, 509 U.S. 86, 97 (1993). The district court noted but declined to follow our decision in Renollett, concluding "that a close reading of Schaffer . . . does not support the IDEA's preemption of Minnesota law on this point." M.M., 2006 WL 2571229 at *15. This was fundamental error. Our decision in Renollett is controlling until overruled by our court en banc, by the Supreme Court, or by Congress. Though the district court described our discussion of the issue as "cursory," our opinion in Renollett cited the page in

Schaffer that left the question open, and we then decided the question for the courts of this circuit.

"Placing the burden of proof on the incorrect party is reversible error" unless the error relates to an "immaterial issue." **West Platte R-II Sch. Dist. v. Wilson**, 439 F.3d 782, 785 (8th Cir. 2006) (citations omitted). We further conclude that the ALJ's award of compensatory educational services and the district court's award of attorneys' fees under the IDEA must be reversed on the merits.

II. The 2003-2004 School Year

Emotional and behavioral issues were noted as a secondary disability when M.M. began receiving special educational services in the third grade. Serious behavioral issues emerged in April 2003, during her sixth grade year, when she brought a four and one-half inch serrated steak knife to Franklin Middle School. M.M. explained that she brought it to school in response to threats by two female classmates. An assistant principal recommended that M.M. be expelled. Instead, the District provided her homebound instruction for the remainder of that school year and transferred her to the Lucy Laney Community School (Laney) that Fall.

When M.M. began the 2003-04 school year at Laney, the District at L.R.'s request re-evaluated M.M.'s educational needs and performance and concluded that she continued to be eligible for special educational services. The evaluation identified

"Emotional, Social, and Behavior" as now being M.M.'s primary disability, SNAP her secondary disability[1], and Speech Language an additional disability. The November 2003 individualized education program (IEP)[2] set emotional and behavioral goals addressing M.M.'s frequent talking in class; kicking and hitting other students at least eight times a day; sleeping and refusing to work three to five days a week; and completing just 30% of her assignments. The IEP set educational goals in math, reading, and speech articulation, and the IEP team developed a Behavior Intervention Plan designed to decrease M.M.'s inappropriate behavior and increase her work completion through closer supervision and "tangible reinforcers."

In February 2004, M.M. was suspended when she got into a fight with another student and kicked and punched a staff member who intervened. The IEP team determined "that the setting here at Lucy Laney is not appropriate," extended the suspension to ten days, and reported that M.M. "will be transferred to another school." The report stated that L.R. "left the meeting early (upset)," but she did not request a due process hearing. M.M. was administratively transferred to Olson Middle School (Olson) on March

---

[1] "Student Needing Alternative Programming" is a disability designation the District uses for a student "with normal intellectual ability [who has] a discrepancy between her measured ability and her demonstrated academic performances."

[2] See generally 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007).

15, 2004, where she completed the 2003-2004 school year. A June 1, 2004, assessment reported that M.M. made adequate progress on her reading and math goals but insufficient progress on her behavioral goals. A social worker at Olson testified that M.M. made behavioral progress in the spring of 2004.

The ALJ concluded that M.M. was denied a FAPE during the 2003-2004 school year because suspensions from school and the District's failure to review and revise her IEP before she was transferred from Laney to Olson "caused a loss of educational benefit." The ALJ awarded twenty hours of compensatory special education services. The district court reduced the award by eight hours but held that M.M. failed to make adequate progress toward her goals between November 2003 and her transfer to Olson in March 2004, "and the District violated her FAPE rights when it did not review and revise the IEP prior to the transfer."

A.

In the fall of 2004, L.R. enrolled M.M. at the Colonel Charles Young Military Academy, a charter school not part of the District. However, one month later, L.R. re-enrolled M.M. at Olson. Relying on three prior decisions,[3] the District argues that the

[3] M.P. ex rel. K. v. Indep. Sch. Dist. No. 721, 326 F.3d 975, 980-81 (8th Cir. 2003); Smith v. Special Sch. Dist. No. 1, 184 F.3d 764, 767-68 (8th Cir. 1999); Thompson v. Bd. of Special Sch. Dist. No. 1, 144 F.3d 574, 578-79 (8th Cir. 1998).

ALJ lacked jurisdiction to hear claims from the 2003-2004 school year because, by withdrawing M.M. from the District without first requesting a due process hearing, L.R. waived her right to challenge educational services provided by the District before the withdrawal.

As the ALJ and the district court noted, our prior cases involved students who were no longer attending school in the school district when the due process hearing was requested. Minnesota law then provided that the hearing "be initiated and conducted by and in the district responsible for assuring that an appropriate program is provided." Minn. Stat. § 125A.09, subd. 6 (2000).[4] We therefore held that "challenges to the student's previous education become moot because the new school district is responsible for providing a due process hearing." Thompson, 144 F.3d at 579. This was a ruling on the merits (failure to state a claim), not a denial of subject matter jurisdiction. Here, M.M. re-enrolled in the District's schools long before L.R. requested the due process hearing. The District's argument that either the ALJ or the district court lacked jurisdiction is without merit.

On the other hand, the ALJ and the district court ignored an additional basis for our decision in Thompson:

---

[4] The current statute provides that the hearing "be held in the district responsible for ensuring that a free appropriate public education is provided." Minn. Stat. § 125A.091, subd. 12(a).

> The purpose of requesting a due process hearing is to challenge an aspect of a child's education and to put the school district on notice of a perceived problem. Once the school district receives notice, it has the opportunity to address the alleged problem.

144 F.3d at 579. After M.M. was suspended for assaulting another student and a member of the Laney staff, L.R. left the IEP team meeting convened to consider the problem, did not request revisions to M.M.'s IEP, did not protest the transfer to Olson or request a due process hearing, and then enrolled M.M. outside the District that fall. Though M.M. re-enrolled at Olson shortly thereafter, this sequence of events gave the IEP team and the District no timely notice of a claim that M.M.'s otherwise appropriate IEP should have been revised before her transfer to Olson. The IDEA required the District to revise M.M.'s IEP "as appropriate to address [ ]any lack of expected progress toward the annual goals and in the general education curriculum." 20 U.S.C. § 1414(d)(4)(A)(ii)(I). Input from L.R. was a critical part of this process. See 34 C.F.R. § 300.324(b)(ii)(C) (effective Oct. 13, 2006), § 300.305(a)(2)(iv) (effective Oct. 30, 2006). In these circumstances, the District may not be held responsible for a failure-to-revise violation in the 2003-2004 school year.

B.

Moreover, the ALJ and the district court applied the wrong legal standard in determining that M.M. was denied a FAPE in the 2003-2004 school year. A school

district meets its IDEA obligations if the student's IEP is "reasonably calculated to enable the child to receive educational benefits." Hendrick Hudson Dist. Bd. of Ed. v. Rowley, 458 U.S. 176, 207 (1982). An IEP "need not be designed to maximize a student's potential commensurate with the opportunity provided to other children." CJN, 323 F.3d at 638-39 (quotation omitted). Rather, "the requirements of the IDEA are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit." Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 (8th Cir. 2003) (quotation omitted); see Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 612 (8th Cir. 1997).

Though M.M.'s November 2003 IEP was appropriate when adopted, the district court upheld the ALJ's conclusion that M.M. "suffered a loss of educational benefit" as a result of the subsequent suspensions and the transfer to Olson. It is doubtless true that any child suffers a loss of educational benefit when suspended, and a transfer caused by serious misbehavior cannot be anything but an educational setback. Yet M.M.'s year-end progress report stated that she made adequate progress on her academic goals during the 2003-2004 school year, and a social worker testified that she made behavioral progress after her transfer to Olson. Compare CJN, 323 F.3d at 642-43. This is not a case like Neosho, where the IEP "did not appropriately address" the student's behavior problem. 315 F.3d at 1028. When a child's primary disability is a behavioral disorder, the school district does not violate IDEA simply because

the child failed to achieve the IEP's behavioral goals.

For these reasons, the award of compensatory special education benefits and attorneys' fees for the 2003-2004 school year is reversed.

III. The 2004-2005 School Year

When M.M. returned to Olson in October 2004, the IEP team met and revised her IEP to increase time spent in special education working toward her math, reading, and behavioral goals. Unfortunately, M.M.'s behavioral issues intensified. She was suspended for disruptive behavior on October 18 and October 26, and for fighting on November 19. In response, the team revised her IEP to increase the amount of time in special education settings. The District completed a new Behavioral Intervention Plan calling for direct daily behavioral instruction, a "point sheet" recording hourly performance that M.M. was to take home each day, and a sequence of increasingly severe sanctions for misbehavior consistent with the District's overall discipline policy. Because M.M. had been suspended for more than ten days, the District also completed a Functional Behavior Assessment that identified multiple incidents of physical aggression threatening the safety of others, noted that negative behavior occurs consistently throughout the school day, and recommended more intensive behavior support and monitoring. See 34 C.F.R. § 300.530(d)(1)(ii) (effective Oct. 13, 2006). Despite these difficulties, two mid-year reports stated that M.M. was making progress in reading, math, writing, and speech, and was

"working on" her behavioral goals.

On January 4, 2005, M.M. was suspended for five days for striking a physically handicapped student in the face. The IEP team, including L.R., agreed that M.M.'s placement at Olson was inappropriate and recommended that she be placed in a "Setting III" EBD program, where she would receive services in a separate classroom from a licensed EBD special education teacher and other professionals for at least 60% of the school day. The District offered to provide this program at Jordan Park Community School (Jordan Park). As M.M. was suspended from Olson, the District also offered five hours of homebound instruction, which L.R. rejected as inadequate.

On January 18, the IEP team met at Jordan Park, where Jordan Park representatives explained their Setting III program. L.R. rejected this proposed placement because of the Jordan Park program's high ratio of male to female students and M.M.'s history of being sexually inappropriate with boys. L.R. asked about the Setting III program for girls at Barton Open School (Barton). The District advised that Barton did not have any openings and offered conciliation or mediation to resolve the change-in-placement disagreement. See 20 U.S.C. § 1415(e); Minn. Stat. § 125A.091, subd. 6-10. L.R. chose mediation.

When M.M. returned to Olson on January 19, her behavior problems continued. On January 21, she was suspended three days for fighting. On February

1, she was suspended four days for having a can of mace at school and assaulting an administrator who tried to take it from her. On February 15, she was suspended four days for assaulting another student. The District again sought L.R.'s permission to implement the proposed IEP placing M.M. in the Setting III program at Jordan Park. L.R. again refused. M.M. was suspended three days for disruptive behavior on February 28, three days for threatening to throw a chair at another student on March 7, and three days for fighting on March 17. The IEP team met on March 9. L.R. did not attend this meeting. The team recommended placing M.M. in the Setting III program at Jordan Park. L.R. again rejected placement at Jordan Park.

The mediation took place on March 28. The parties agreed that M.M. would transition to the W. Harry Davis Academy (Davis), a Setting II placement, while the parties explored the Setting III program at Barton. L.R. made an unscheduled visit to Barton, talked to one teacher, and told the District that the Barton program was not appropriate because it did not sufficiently emphasize academic performance.

M.M. enrolled at Davis on April 11. Before an updated behavioral assessment could be completed, she was suspended five days for using mace while fighting another student. The IEP team proposed that M.M. receive homebound services for the remainder of the school year. L.R. rejected homebound placement and returned M.M. to Davis

on May 3. School officials advised that M.M. would be searched each day for weapons. When L.R. objected and removed M.M. from school, the District threatened a truancy proceeding. M.M. returned to school, cooperated in a noninvasive search procedure, and did quite well at school for the remainder of the school year. L.R. filed a complaint and a request for a due process hearing.

At the hearing, M.M. argued the District denied a FAPE by failing to offer placement in a Setting IV program in a school outside the District. The ALJ rejected this claim, concluding that a Setting III program was the least restrictive environment for M.M. See 20 U.S.C. § 1412(a)(5)(A). The ALJ further concluded that the District denied M.M. a FAPE between January and April 2005 by proposing a change of placement to a Jordan Park program that L.R. and the IEP team had determined was inappropriate; by imposing a pattern of repeated suspensions that constituted a change of placement without parental consent, contrary to IDEA's "stay-put" provision, 20 U.S.C. § 1415(j); and by failing to provide educational services during these suspension periods. The ALJ ordered the District to place M.M. in the Barton Setting III program and awarded her 168 hours of compensatory educational services for the 2004-2005 school year. The district court upheld the award, concluding that the District failed to provide a FAPE between January and April 2005 when it offered M.M. only the Jordan Park Setting III program and repeatedly suspended her in violation of its stay-put obligations. M.M., 2006 WL 2571229 at *26.

The IDEA includes a number of procedural safeguards "that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." Honig v. Doe, 484 U.S. 305, 311-12 (1988). One of those safeguards is the "stay-put" provision; during the pendency of mediation, a due process hearing, or judicial review, "the child shall remain in the then current educational placement" unless the parent and school officials agree to an interim or permanent change. 20 U.S.C. § 1415(j). In Honig, the Court held that school officials violate the stay-put provision if they unilaterally expel or indefinitely suspend a disabled child for violent or dangerous misconduct. However, the Court approved a Department of Education policy that temporary suspensions of ten days or less do not constitute a unilateral change in placement. 484 U.S. at 323-25 & n.8.

A.

In this case, the IEP team and L.R. agreed in January 2005 that M.M.'s placement at Olson was no longer appropriate; she needed a change of placement to a more structured Setting III program. However, L.R. rejected the District's offer to place M.M. in the Setting III program at Jordan Park. The District then recognized its stay-put obligations by maintaining M.M.'s placement at Olson under the November 2004 stay-put IEP until L.R. agreed to an interim transfer to Davis as part of the mediation agreement. The ALJ and the district court nonetheless concluded that the series of short suspensions totaling more than ten

days between January and April of 2005 constituted a change in M.M.'s placement without parental consent that violated the stay-put requirement in 20 U.S.C. § 1415(j).[5] We disagree.

When a parent and the school district's educational professionals agree that a child with a behavioral disability needs a change of placement but cannot agree on an appropriate alternative, the school district must maintain the current, admittedly inappropriate placement under the stay-put IEP until the due process proceedings have concluded, unless the parties agree to an interim alternative placement. See CP v. Leon County Sch. Bd. Fla., 483 F.3d 1151, 1157-58 (11th Cir. 2007). If the child continues to misbehave in ways that endanger herself, other students, or school staff, school officials have the authority under Honig and 20 U.S.C. § 1415(k)(1)(B) to impose suspensions of less than ten days so long as the discipline is consistent with school disciplinary policies and the stay-put IEP. Even a "pattern" of such suspensions is not a *unilateral* change of placement. The parties have agreed that a change of placement is needed; only their failure to agree on an interim change, combined with the school district's stay-put obligations, have left the child in a setting

---

[5] The Department of Education regulations provide that short suspensions that total more than ten days may constitute a unilateral change of placement. See 34 C.F.R. § 300.536 (effective Oct. 13, 2006). "Suspensions exceeding ten days can create a change in placement, but do not necessarily do so." Parents of Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 1495 (9th Cir. 1994).

that is not successfully controlling her dangerous misbehavior. The ALJ and the district court erred in concluding that the District violated § 1415(j) by complying with its stay-put obligations under that statute.

B.

When a disabled child has been suspended for more than ten days without a change in placement, the regulations provide that the child must continue to receive educational services "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP." 34 C.F.R. §§ 300.530(c), (d)(1)(i) (effective Oct. 13, 2006). The ALJ concluded that the District violated this duty by failing to provide M.M. educational services during the days she was suspended between January and April 2005, ignoring the undisputed fact that L.R. rejected the District's offers of home schooling services during this period. This was error. When these suspensions occurred, the parties had already agreed to a change in placement. In that situation, "the child's IEP Team determines appropriate services under paragraph (d)(1)." 34 C.F.R. § 300.530(d)(5). Because the stay-put provision is in effect, the parent must agree to any change in education services. Here, L.R. refused the District's offers of additional home schooling services. The ALJ made no finding that these offers, if accepted by the parent, would not have met the requirements of 34 C.F.R. § 300.530(d)(1)(i) or failed to provide M.M. with a FAPE.

After mediation, L.R. agreed to an interim placement in the Setting II program at Davis, where M.M. almost immediately incurred a five-day suspension for using mace in a fight with another student. After this initial difficulty, the record reflects that Davis provided M.M. "some educational benefit" by the end of the 2004-2005 school year. Thus, as in CP, "we need not consider what course of action a school board *might* take where the then-current placement fails to provide FAPE." 483 F.3d at 1158 (emphasis in original). Even in that difficult situation, the school district should not be liable if the parent, as in this case, has rejected both the offer of an appropriate change-of-placement setting and the offer of interim home schooling services during suspensions authorized by the school's disciplinary policies and consistent with the stay-put IEP.

C.

Finally, the ALJ concluded that the District denied M.M. a FAPE in March 2005 when it proposed placement in a Jordan Park Setting III program that L.R. and the IEP team had determined was inappropriate. L.R. rejected placement in the Jordan Park program at a January 18 IEP team meeting at Jordan Park. The ALJ's finding that the IEP team agreed with L.R. is dubious at best. One team member, social worker Bill Smart, testified that he attended the January 18 meeting and agreed with L.R. that a boy-dominated Setting III program was not appropriate for M.M. because of her prior sexually inappropriate behavior with boys. However, the January 18 meeting was not attended by four of

M.M.'s teachers who were members of the IEP team and who attended a March 9 meeting when the IEP team, in L.R.'s absence, adopted a proposed IEP placing M.M. in the Setting III program at Jordan Park. Smart attended the March 9 meeting, and there is no record that he disagreed with the recommended Jordan Park placement.

Moreover, the record does not support the conclusion that the District denied M.M. a FAPE by proposing the Setting III placement at Jordan Park. M.M.'s prior fights and assaults, and the weapons she brought to school, were the most serious behavioral problems that required a change in placement. All had involved altercations with other girls. While it was reasonable for L.R., the parent of a middle school girl with an emotional and behavioral disability, to be concerned about her sexually inappropriate conduct around boys, M.M.'s history of violent behavior toward other girls made it reasonable for the District to offer a Setting III placement at Jordan Park, where boys predominated, particularly when there were no immediate openings in the Setting III program at Barton, where girls predominated.

Finally, the record does not support the district court's conclusion that the District violated IDEA because it failed to offer what the ALJ ultimately concluded was the appropriate placement -- the Setting III program at Barton. The March 28, 2005, mediation agreement provided that L.R. would promptly visit Barton to learn about its Setting III program. L.R. made an informal visit a few days later, talked to one teacher, told the District that the

Barton program was unacceptable, and later refused to reconsider her decision. With the parent having adamantly rejected a Setting III placement at Barton, the District did not violate the IDEA by failing to offer this placement "formally" before the due process hearing, when the ALJ determined that Barton was a more appropriate placement than L.R.'s more restrictive Setting IV alternative.

After careful review of the record, we conclude that the District did not violate the IDEA when (i) the IEP team including L.R. agreed in January 2005 that a change ofplacement to a more restrictive setting was needed; (ii) L.R. rejected the placement offered by the District (and by the other members of the IEP team), as well as the District's proposals for interim home schooling; and (iii) the setting proposed by L.R. at the due process hearing was found to be less appropriate for the child than the setting offered by the District and rejected by L.R. See T.F. v. Special Sch. Dist. of St. Louis County, 449 F.3d 816, 821 (8th Cir. 2006). Accordingly, the award of compensatory special education benefits and attorneys' fees for the 2004-2005 school year is reversed.

IV. Conclusion

The final order of the district court dated September 5, 2006, is reversed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-3572

M.M., by and through her parent and natural guardian, L.R., Appellee

v.

Special School District No. 1, Minneapolis, Minnesota and Minneapolis Board of Education,
Appellants

- - - - - - - - - - - - - - -

Minnesota School Boards Association, Amicus on Behalf of Appellant

---

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:05-cv-02270-RHK)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed in accordance with the opinion of this court.

January 04, 2008

Order Entered in Accordance with Opinion: Clerk,
U.S. COURT OF APPEALS, EIGHTH CIRCUIT.
/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

* *

M.M., by and through her Parent and Natural Guardian, L.R.,

Plaintiff,

VS. REPORT AND RECOMMENDATION

Special School District No. 1, Minneapolis, Minnesota, Minneapolis School Board,

Defendants. Civ. No. 05-2270 (RHK/RLE)

* *

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a special assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b)(1)(B), upon the Plaintiff's Motion for an Award of Attorney's Fees and Costs, and the Defendants' Motion for Summary Judgment. A Hearing on the Motions was conducted on March 7, 2006, at which time, the Plaintiff[1] appeared by Margaret O'Sullivan Kane, Esq., and the Defendants

[1] Since the Plaintiff's action is presecuted on her behalf by L.R., we employ the term "Plantiff" to jointly refer to L.R. and M.M.

appeared by Laura Tubbs Booth, Esq.

For reasons which follow, we recommend that the Defendants' Motion for Summary Judgment be granted, in part, and that the Plaintiff's Motion for Costs and Attorney's Fees be granted, in part.

II. Procedural and Factual Background

A. Procedural Posture. Pursuant to the Individuals with Disabilities Education Act, Title 20 U.S.C. §1400, et seq. ("IDEA"), the Federal Government ensures that students with disabilities receive a "free, appropriate public education" ("FAPE"). See, Title 20 U.S.C. §1400(d)(1)(A). The IDEA imposes extensive procedural and substantive requirements on participating State and local agencies to safeguard a disabled student's right to FAPE. Among the procedural safeguards that are mandated by the IDEA, Section 1415(f) requires that an independent Due Process Hearing be conducted by a State, or local educational agency, so as to insure that the parents of handicapped children will be afforded an opportunity to register their complaints concerning a public school's evaluation, or the educational placement of their child. See also, Title 20 U.S.C. §1415(b)(6). Pursuant to the Act, the State of Minnesota has promulgated Rules which create a procedure for the conduct of such Hearings. See, Minnesota Statutes Section 120A.091, Subdivision 12; Minnesota Rule 3525.4300; see also, Honig v. Doe, 484 U.S. 305, 311-12 (1987)(The procedural safeguards "guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any

decisions they think inappropriate.").

In accordance with Minnesota law, a Due Process Hearing was completed below, in which, an Administrative Law Judge ("AU"), who was appointed by the Minnesota Commissioner of Education, see, Minnesota Rule 3525.3900, Subpart 5, heard three days of testimony, and concluded that the Defendants Special School District No. 1, and the Minneapolis School Board (collectively "the District"), had failed, in certain respects, to provide M.M. with a FAPE, as is required by the IDEA. As a result, the AU directed the District, among other things, to provide M.M. with compensatory educational services.

The Plaintiff subsequently commenced this action by filing a Complaint seeking costs and attorney's fees, pursuant to Title 20 U.S.C. §1415(i)(3)(B)(i)(I), which provides, as follows:

> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys fees as part of the costs * * * to a prevailing party who is the parent of a child with a disability.

The Plaintiff contends that she was the "prevailing party" in the proceedings below and, as a result, she is entitled to an award of costs and attorney's fees. The District has challenged the Plaintiff's assertion that she was the "prevailing party" in the administrative proceeding, and has filed a Counterclaim, which appeals all aspects of the ALJ's decision in the underlying administrative proceeding.

with the exception of M.M.'s placement in the Federal Setting III Program at the Barton Open School, and specifically challenges the All's award of compensatory education benefits for the 2003-04 and 2004-05 school years. The Plaintiff has moved for Summary Judgment on her request for an award of costs and attorney's fees, and the District has moved for Summary Judgment on its Counterclaim -- that is, its appeal of the ALJ's decision.

B. Factual Background. As related by the ALJ, M.M. is a 14-year old resident of the District, who has attended school in the District for all but approximately three weeks -- from September 7, 2004, until September 27, 2004 -when her mother, L.R., enrolled her in the Colonel Charles Young Military Academy. [Transcript ("T.") 306, and 311, District's Exhibit ("D.") 707]. M.M. was initially found eligible for special education services in the third grade, while she was attending Jordan Park Elementary School, [D. 313], under the criteria for Students Needing Alternative Programming ("SNAP"), which is a special designation for students in the District who demonstrate low achievement, but who do not otherwise qualify for special education services under the State's criteria for a Specific Learning Disability. [T. 58-59].

M.M. attended the Jenny Lind Elementary School, which is part of the District, for her fifth grade year, then moved to the Franklin Middle School during the 2002-03 school year. [D. 707]. From 1996, until approximately February of 2003, M.M. lived with her grandmother, while her mother served

a term of imprisonment. [D. 705]. M.M. has lived with her mother, grandmother, or both, since February of 2003. [D. 705].

M.M.'s serious trouble in school began in the sixth grade at Franklin Middle School, when teachers discovered that she had brought a four and one-half (41/2) inch serrated steak knife to school. [D. 651]. M.M. reported that she had brought the knife to school in order to protect herself from two other girls who had threatened her. [D. 651]. M.M.'s Individualized Education Program ("IEP") team determined that the incident was not a manifestation of M.M.'s disabilities, and they recommended that she be expelled from school. [D. 652]. The District suspended M.M. for the day, but did not expel her. The District agreed with M.M.'s grandmother that M.M. would be reinstated, but that she would not return to Franklin Middle School. Instead, the District agreed to provide M.M. with homebound instruction for the remainder of the 2002-03 school year, and that M.M. would be transferred to a school, other than Franklin Middle School, or Jordan Park Elementary School, in the Fall. [D. 652].

In the Fall of 2003, M.M. was transferred to the Lucy Laney Community School. At L.R.'s request, the District re-evaluated M.M.'s eligibility for special education services, and determined that M.M. qualified for special education services under the criteria for an Emotional Behavior Disorder, as her primary disability; that she continued to satisfy the criteria for SNAP eligibility; and that she also had a Speech Language disability. [D. 319-20]. As a result,

on November 19, 2003, the District developed a new IEP for M.M., which included academic, communication, and behavioral goals. [D. 297-304]. The District also developed a Behavior Intervention Plan ("BIP"), in order to address M.M.'s disruptive actions. [D. 323].

On February 13, 2004, M.M. was involved in a fight with another student. When a staff member attempted to intervene, M.M. kicked him and punched him in the face. [D. 666]. The ALJ concluded that M.M. was suspended "for several days," as a result of the assault, and the supporting documents appear to reflect that M.M. was suspended from approximately February 13, 2004, until March 2, 2004, for a total of ten (10) school days. [D. 666, 292].[2] On February 24, 2004, M.M.'s IEP team determined that Lucy Laney was not an appropriate setting for

---

[2] The ALJ noted that the Record did not allow for a precise determination of the total number of days that M.M. was suspended, during her enrollment at Lucy Laney. However, the ALJ went on to find that "it appears likely that she had been suspended for at least ten days before the incident on February 13, 2004, because at that time the district held an IEP meeting to make a manifest determination." Affidavit of Margaret O'Sullivan Kane ("Kane Aff."), Exh. 1., at p. 5, ¶13. The ALJ further noted that "[o]ther records suggest that it is the district's policy to hold such meetings concerning disabled students when the total number of suspension days in a school exceeds ten." Id.

M.M., and they recommended that she be transferred to a different school. [D. 292]. As a result, M.M. was administratively transferred to Olson Middle School on March 15, 2004, where she completed the 2003-04 school year. In making that recommendation, the IEP team did not specify why the Lucy Laney Community School was not an appropriate setting, or why the Olson Middle School would provide a better environment for M.M. [D. 292].

It appears that M.M. made some progress both academically, and behaviorally, during the final part of the 2003-04 school year, but that her behavioral progress was insufficient to satisfy the goals that had been established in her IEP. [D. 306]. However, the Progress Report, which is dated June 1, 2004, also reflects that absences due to suspensions had interfered with M.M.'s learning. [D. 306]. No records of suspensions were made a part of the Record for the time periods between March of 2004, and the end of the 2003-04 school year, although it appears that M.M. was suspended for approximately six (6) days during that time period.[3]

---

[3] A Functional Behavioral Assessment ("FBA") was completed for M.M. on December 13, 2004. [D. 227-30]. According to the FBA, M.M. had twelve (12) days of out-of-school suspension, and one (1) day of in-school suspension, on record at Olson Middle School. [D. 227]. Other records suggest that, prior to that date, M.M. had received six (6) days of out-of-school suspension, and one (1) day of in-school suspension during the 2004-05 school year. [D. 708, Student's Exhibit ("S."), 199, 211]. As such, it is a fair inference

As noted, M.M. started the 2004-2005 school year at Colonel Charles Young Military Academy, which is a charter school that was selected by L.R. [T. 306-307]. M.M. left the charter school after approximately three weeks, and re-enrolled in the District, at Olson Middle School. [D. 50, 707]. Immediately upon her re-enrollment, M.M.'s IEP team met to discuss potential revisions to the IEP and, on October 7, 2004, the District proposed a revision of M.M.'s IEP that would decrease the amount of time that M.M. would spend with non-disabled peers, and would increase the service minutes that M.M. would receive towards the accomplishment of her reading, writing, and behavioral goals. [D. 281-282]. Specifically, under the revised IEP, M.M. would receive thirty (30) minutes of special education services for speech and language pathology, two (2) times per week; thirty (30) minutes of services for behavior management, five (5) times per week; fifty (50) minutes of services for math, five (5) times per week; thirty-five (35) minutes of services for reading, five (5) times per week; and fifteen (15) minutes of services for writing, five (5) times per week. [D. 280]. L.R. did not consent or object to the revision, which became effective on October 21, 2004. [D. 283].[4]

---

that M.M. was suspended for a total of six (6) days between March 15, 2004, and the end of the 2003-04 school year, following her transfer from Lucy Laney Community School to Olson Middle School.

[4] The Record reflects notice of the proposed changes

On October 11, 2004, the School District sent L.R. a Notice of a Team Meeting, which advised L.R. and M.M. that a meeting would be commenced on October 18, 2004, for the purposes of reviewing M.M.'s IEP, and to develop a secondary transition plan, as well as to discuss the development of a behavioral assessment. [D. 275]. L.R. did not attend this meeting, which resulted in the development of a proposed IEP. [D. 241-246]. In addition to several specific educational and behavior goals, the proposed IEP suggested that M.M. be provided with extended time to complete assignments that required extensive reading and writing; that M.M. be required to carry a behavior monitoring sheet; and that M.M. be expected to follow the Minneapolis Public School behavior policy. [D. 245].

As noted by the ALJ, it is unclear from the Record, whether this proposed IEP was ever sent to L.R., or whether it ever became effective.[5] However, a

---

was sent to L.R. on or about October 7, 2004, [D. 277], and that the IEP became effective seventeen (17) calendar days after the notice was sent to L.R. [T. 46-47, D. 283]. However, both the Record, and the findings of the AU, reflect that the IEP became effective on October 21, 2004, Kane Aff., Att. A, p. 6, at 19, [D. 283], which is only fourteen (14) calendar days after the notice was sent. This discrepancy has no bearing on our analysis, and will not be addressed further.

[5] Notably, while the School District's List of Exhibits contains references to an IEP of October 18, 2004,

progress report, which was created on November 5, 2004, identifies October 18, 2004, as the date of the IEP, which tends to suggest that the IEP did become effective. [D. 238]. The Progress Report also reflects that M.M. was making adequate progress on her speech goals at that time. [D. 238]. The District also notes that L.R. made a request for M.M. to repeat the seventh grade and, as a result, M.M. was placed in a combined sixth/seventh grade setting, in order to avoid placing her with some seventh grade students with whom she had negatively interacted in the past. [D. 50].

On October 18, 2004, M.M. received one (1) day of in-school suspension and, on October 26, 2004, M.M. was suspended for three (3) days as a result of disruptive behavior in the "time-out room." [Student's Exhibit ("S.") 199]. M.M. was again suspended for three (3) days on November 19, 2004, for fighting. [D. 708, S. 199, 211]. On November 22, 2004, the IEP team modified M.M.'s educational plan, such that the number of minutes set aside for speech education was reduced to fifteen (15), twice weekly, while M.M. would now be spending between twenty-one (21) and sixty (60) per cent of her time in a special education resource room, as the least restrictive environment for M.M. to receive a FAPE. [D. 138]. The ALJ noted that no notice of the IEP team meeting was sent to L.R., but that the Record reflects that L.R. was

---

see, District's Exhibit List/Index, at unnumbered p. 2, Administrative Record, Item No. 59, referencing D. 254-259, 269-274, those Exhibits do not appear to have been made a part of the Administrative Record.

present at the meeting. [D. 133]. Apparently, L.R. did not object to the proposed IEP, nor were any objections noted by the remainder of the IEP team. [T. 78]. On November 30, 2004, the District conducted a transition evaluation of M.M., in order to facilitate M.M.'s transition from school to work, and to assess her post secondary needs. [D. 233].

On December 10, 2004, the District created a Progress Report for M.M. According to the Report, M.M. had made slight progress on her math and reading goals, and moderate progress in her writing goals. The Report reflects that M.M.'s speech goals were "not introduced," and that she was "working on" her behavioral and organizational goals. [D. 249-253].

The District completed a modified BIP, on December 10, 2004, in order to address concerns about M.M.'s difficulties in interacting with her peers; her failure to complete her school work; her failure to comply with staff directives; her fighting; and incidents in which she had been sexually inappropriate with boys. The BIP reflected that M.M. was receiving poor grades in all of her classes because she did not regularly complete her assignments; that she was noncompliant, and verbally disrespectful, to staff on at least three (3) occasions per week; and that she had received at least seven (7) days of suspension during the school year for disruptive behavior, uncooperative behavior, and fighting. [D. 231]. The BIP called for M.M.'s assignments to be adapted to her instructional level; that she be paired with a partner or receive extended time to meet deadlines; and that she be placed in a location where she would

not be distracted by other students, or noise in the hallway. The BIP also required that M.M. receive daily direct instruction concerning appropriate interaction with peers and adults, and that she be reminded of work that she had been asked to complete by teachers, as well as to check with her teachers for missing work. [D. 231]. M.M. was required to carry a point sheet every day, which would provide an assessment of her hourly performance. According to the BIP, M.M. would be required to bring the point sheet home with her on a daily basis, and L.R. would determine the appropriate reward or consequences for M.M.'s behavior. At school, M.M. was to receive praise or feedback each hour based on her performance.

The BIP also set forth the proper staff response to future instances of M.M. becoming verbally disrespectful or noncompliant with staff directives. Initially, staff were directed to employ nonverbal redirection, verbal redirection, and proximity, to get M.M. back on task. If M.M. continued to be disrespectful or noncompliant, the BIP called for her to be placed in a designated time out area -- other than the hallway -until she was ready to cooperate with staff. In the event that M.M. persisted in her noncompliance, she would be removed from the classroom to a Behavior Support Room.

If she did not comply with the staff in the Behavior Support Room, administration would determine the appropriate consequences. If she complied, administration would determine the appropriate action prior to her readmittance into the

classroom. If M.M. still continued to be disrespectful or noncompliant with staff direction, she would be placed in "in school" or "out of school" suspension. The BIP also clarified that M.M. was not exempt from the Minneapolis Public School Discipline Policy. [D. 232].

A Functional Behavioral Assessment ("FBA") was completed on December 13, 2004, because the District had imposed twelve (12) days of out-of-school suspension, and one (1) day of in-school suspension, during her enrollment at Olson Middle School, and because an FBA is required when a student has over ten (10) days of suspension on record. [D. 227]. The FBA addressed concerns that M.M.'s disruptive behaviors had increased throughout the course of the 2004-05 school year. [D. 228]. In pertinent part, the FBA recommended that M.M. receive more intensive behavioral support in a smaller, structured classroom environment. [D. 230].

On December 14, 2005, M.M. was suspended for two (2) days for disruptive behavior. [D. 708-709, S. 211]. M.M. was suspended again, on January 4, 2005, for five (5) days, after she struck a physically handicapped student in the face. [D. 215, 224-225]. A manifest determination meeting was conducted on the following day, at which the IEP team determined that the suspension was a manifestation of M.M.'s disability. Recognizing that M.M.'s disruptive behaviors had increased, despite significant intervention efforts, the IEP team agreed that Olson Middle School was not an appropriate placement for M.M. [D. 224-225]. The IEP team recommended that

M.M. be placed in a Federal Setting III SPAN program.[6] L.R. initially agreed that SPAN would be a good placement for M.M., [D. 224], and the District advised that it would provide five (5) hours of homebound instruction while awaiting the SPAN placement. [D. 199]. However, as noted by the ALJ, no homebound instruction was provided during that time period. [T. 127].

On January 18, 2005, an IEP meeting was conducted, in which the District proposed that M.M. be placed in the Setting III Program at Jordan Park Middle School, and that M.M. would be expected to follow citywide disciplinary policies, Jordan Park expectations, and SPAN expectations, but that the length of suspensions could be modified. [D. 180]. L.R. refused to consent to the placement. [D. 174]. L.R.'s objection to the placement was predicated on the high ratio of male to female students in the program, and M.M.'s history of sexually inappropriate behaviors. Instead, L.R. expressed her desire to look at the Setting III program at the Barton Open School, which is a predominantly girls program. [D. 194]. However, at that time there were no openings at the Barton Open School program. [T. 455-57].

At the Hearing, Bill Smart ("Smart"), who is a social worker at Olson Middle School, and who was a member of M.M.'s IEP team there, testified that he concurred with L.R.'s assessment that, given M.M.'s

---

[6] "SPAN" is an acronym for a Federal Setting III program. [T. 518].

history of sexually inappropriate behavior towards boys, the high ratio of boys to girls at the Jordan Park program rendered that program inappropriate for M.M. [T. 457]. Similarly, Don Allen ("Allen"), who is one of the Assistant Directors of Special Education for the District, [T. 513], agreed with the ALJ's assessment that the District had proposed a Setting III placement for M.M. in January of 2005, and had arranged for L.R. to visit the Jordan Park program, but that, after the visit, "everyone agreed that [the Jordan Park] program was not appropriate for [M.M.] because she had been sexually inappropriate in the past with boys." [T. 556].

M.M. returned to school on or about January 19, 2005, [T. 350], and within days she was suspended for three (3) days for fighting. [S. 211]. The IEP team determined that this behavior was a manifestation of M.M.'s disability, and decided that homebound services would begin as soon as a teacher could be located. [D. 193]. M.M. was suspended, again, on February 1, 2005, for four (4) days, after she had brought a can of mace to school, and again, on February 15, for four (4) days, after she assaulted another student. [S. 199, 211]. On February 16, the District sent L.R. a notice of the District's proposed action, which sought permission from L.R. to implement the IEP of January 18, 2005, which, in turn, called for M.M. to be placed in the Jordan Park SPAN program. L.R. refused to consent to the proposed action. [D. 173-74].

M.M. was suspended for one (1) to three (3)

days on February 28,[7] for disruptive behavior, and again on March 7, for three (3) days, after she threatened to throw a chair at another student, and again on March 17, for three (3) days, for fighting. [D. 708, S. 199, 211]. Also on March 3, L.R. was present at the school where she witnessed an argument between M.M. and one of her peers. L.R. responded by saying something to the effect that, "if he [the other student] puts his hands on my daughter I will slap him" and, as a result, the District sent L.R. a "no trespass" notice. [D. 115]. Another IEP team meeting was conducted on March 9, at which the team, again, proposed that the M.M. be placed in a Setting III SPAN program, and identified Jordan Park as an appropriate setting. [D. 152]. L.R. did not attend the IEP meeting, and a Notice of the proposed action was sent to L.R. L.R. objected to the proposed IEP and, pursuant to L.R.'s request, a mediation took place on March 28, 2005. L.R. testified that she sought mediation because she wanted M.M. to be transferred out of Olson, and because she was concerned that M.M. was not receiving all of the services that she needed for the time periods when she was suspended. [T. 341-342].

At the mediation, the District had agreed that it would try to get M.M. into the SPAN program at Barton Open. [T. 336-337]. However, after visiting

---

[7] S. 199 reflects that M.M. was suspended for two (2) days on February 28, 2005, while S. 211 suggests that the February 28 suspension lasted three (3) days, and D. 709 provides that M.M. was only suspended for one (1) day on February 28.

with a teacher from the Barton Open program, L.R. concluded that the program focused too heavily on behavior, as opposed to academics, and that such a placement would be inappropriate for M.M. [T. 338]. In any event, the ALJ noted that it is not clear whether there was ever an opening at Barton Open, or whether the option was ever presented to L.R. prior to M.M.'s Due Process Complaint.[8]

The mediation agreement also contained some discussion of compensatory education minutes to make up for services that had not been provided during the 200405 school year. Apparently, the District subsequently agreed to provide M.M. with a total of 390 minutes in compensatory benefits. [D. 1.]. Smart testified that he was under the impression that L.R. had agreed to the 390 minutes, based on his belief that a conversation between Barbara Muir ("Muir"), who is the Principal at Olson Middle School, and L.R. had occurred, but that he was not a part of that conversation. [T. 484]. However, L.R. testified that she did not agree with the District's calculation of compensatory minutes. [T. 363-367]. Subsequently, Smart provided M.M. with a total of sixty (60)

---

[8] As part of its Offer of Settlement dated July 29, 2005, the District offered to place M.M. in the Barton Open Setting III Program. See, Kane Aff., at Exh. 5. Also, in a letter from counsel for the District to counsel for the Plaintiff, the District reiterated its offer to place M.M. in the Barton Open program. See, Letter of August 8. 2006. from Laura Tubbs Booth to Margaret O'Sullivan Kane, at unnumbered p. 1, Administrative Record, at Item No. 12.

minutes of services on April 12, and April 14, 2005. [D. 1-4]. Apparently, the District had scheduled other times for Smart to complete the compensatory minutes, but that, during those times, M.M. had either refused to cooperate, was suspended, or was otherwise absent from school. [D. 4].

Pursuant to the mediation agreement, M.M. was enrolled in the W. Harry Davis Academy, on April 11, 2005. [D. 707]. M.M.'s IEP team also met that day, in order to discuss M.M.'s transition from Olson Middle School, and potential changes to M.M.'s IEP, and to schedule an updated FBA for April 28, 2005. [D. 144]. On April 18, 2005, M.M. was suspended for her involvement in a fight in which M.M. used mace on another student. The mace was apparently provided to M.M. by her aunt. [D. 7-14, T. 436]. On April 25, 2005, the IEP team conducted a meeting, in which they determined that the fight was a manifestation of M.M.'s disability. [D. 15]. On April 26, 2005, a proposed IEP was delivered to L.R., which called for a homebound placement with approximately fifteen (15) hours of service per week for the duration of the 2004-05 school year. [D. 637-642]. However, L.R. did not agree to the proposed IEP because, in her view, it did not provide enough services. [T. 429-432]. While the District sent schoolwork for M.M. to complete at home, no homebound instruction was provided during the period of suspension. [T. 196].

On May 2, 2005, L.R. notified Jennifer L. Crouch, who is the Social Worker at the W. Harry Davis Academy, that she would not agree with the

proposed IEP and, on May 3, M.M. was allowed to return to school. However, given M.M.'s history of fighting, she was advised that she would be subjected to a daily search, in order to ensure that she did not have any weapons in her possession. [D. 630]. After observing the search, L.R. took M.M. home, and kept her there until May 10, 2005, because she did not want M.M. to be subjected to the daily search. [T. 377]. The District subsequently sent L.R. a truancy letter, which advised L.R. that M.M. was required to attend school, and M.M. returned to school on May 11, 2005. Upon her return, M.M. continued to be searched each morning. M.M. cooperated with the procedure, and no weapons were discovered during the daily searches.

At some point near the end of the 2004-05 school year, M.M. was the victim of a sexual assault outside of the school. [D. 705]. As a result, she missed several days of school. [D. 708].

On May 16, 2005, the Plaintiff filed a Complaint and Request for Due Process Hearing, in which she asserted that the District had failed to provide her with a FAPE by excluding her from the public education setting through suspensions, exclusions, and administrative transfers within the District. Kane Aff., at Exh. 2. The Plaintiff also asserted that the District was failing to address M.M.'s behaviors with an appropriate BIP, and that the District had failed to provide specific services to address M.M.'s learning disabilities. The District generally denied the allegations in the Plaintiff's Complaint, and requested a Hearing on the issue of

whether a Setting III placement was appropriate for M.M. Letter of May 18, 2005. from Laura Tubbs Booth to Kathleen Sheehy, Administrative Record, at Item No. 45.

As part of her Notice of Request for a Hearing, the Plaintiff sought the conduct of a comprehensive Independent Educational Evaluation ("IEE") at the District's expense. The parties subsequently agreed to an IEE, such that Dr. Cindy Spicuzza, who is a pediatric neuropsychologist, would be retained to review M.M.'s student records, and further agreed that, if Dr. Spicuzza recommended further testing, the District would cover the expense of such testing. Id., at Exh. 3. Subsequently, upon the recommendation of Dr. Spicuzza, a FBA was conducted by Janice Ostrom ("Ostrom"), who is a licensed psychologist, and a Board Certified Behavior Analyst.

Following her evaluation, Dr. Spicuzza determined that M.M. had normal verbal reasoning abilities, good verbal learning and memory skills, good verbal fluency, good simple mental flexibility, and normal deductive reasoning. However, Dr. Spicuzza also noted significant cognitive limitations and behavioral history, and she diagnosed M.M. with a mild conduct disorder, attention deficit/hyperactivity disorder of the inattentive type, and mood disorder, not otherwise specified. Dr. Spicuzza also opined that M.M.'s disruptive behaviors were unlikely to remit, and probably required a more restrictive setting including, possibly, a day treatment program, to ensure the best educational

outcome. [D. 705, at p. 7-8].

Dr. Spicuzza also provided a number of other recommendations, including the avoidance of programs that rely heavily on penalties, demand critical self-analysis, or require earning points; that opportunities for successful social interactions be created by engaging M.M. in adult-supervised, small-group, structured social activities; that M.M. be provided with frequent breaks during academic tasks; that mainstream education be avoided unless behavioral and social control is gained; that M.M.'s workload be reduced, but that she be challenged academically; that M.M. be provided with individualized help; that tasks be broken down into small and manageable steps; that M.M. be provided with greater organizational support at times of transition; that M.M. be provided with extended time on tests; that tests be conducted in a minimally intrusive environment; that M.M. be provided help with organizational needs, in terms of both assignments and material needs; that prior to testing, M.M. be provided with simple written outlines, pre-test study guides, and key terms or concepts that she should be focusing on; that M.M. be provided with step-by-step instructions on higher order tasks; that note-taking support and consistent keyboard instruction be considered; and that some hands-on activities be offered to enhance attention and active engagement.

On August 2, 2005, Ostrom issued a Report following her FBA of M.M. [S. 213]. In her Report, Ostrom recognized that M.M. is an extremely social

child, and that strategies which provide attention to positive behavior, while ignoring inappropriate or problematic behavior, should be employed. Ostrom recommended that M.M. be placed in a highly restrictive environment, and that it would be appropriate for the IEP team to consider a more restrictive Federal Setting. Ostrom also recommended that strategies be employed to enhance M.M.'s participation, by maintaining brief periods of high level structure consisting of direct, or hands-on participation, and modification of instructional materials to correspond to M.M.'s academic level; that an adult mentor be utilized to help M.M. process social situations; and that strategies be developed to prompt M.M. to separate herself from difficult social situations. [S. 213].

On August 5, 2005, M.M.'s IEP team met to discuss placement options for M.M. Also present at the meeting were counsel for the Plaintiff, Dr. Spicuzza, and Ostrom. The meeting included presentations on the Barton Open program, as well as two programs from outside of the District, one of which was identified as the STRIVE program. [D. 733]. No agreement was reached during that meeting as to an appropriate placement for M.M.

On September 1, 2005, the ALJ issued Findings of Fact, Conclusion, and Decision, in which she concluded that the District had failed to satisfy the requirements of the IDEA in several different respects. See, Affidavit of Margaret O'Sullivan Kane ("Kane Aff."), at Exh. 1. Specifically, the ALJ found that M.M.'s repeated suspensions, during the 2004-05

school year, constituted a change in placement without parental consent, id. at p. 19, ¶11; that the District had failed to review and revise M.M.'s IEP in March of 2004, when M.M. was transferred from Lucy Laney to Olson Middle School, and between January and April of 2005, id., at p. 20, ¶17; and that the District failed to provide L.R. with written notice before eliminating the student's speech services. Id., at p. 21, ¶23. Additionally, the ALJ made the following finding:

> The district has proved by a preponderance of the evidence that the student requires placement in a Setting III program; however, the IEP proposed by the district on March 9, 2004,[9] does not provide the student with FAPE because it calls for placement in a specific program that the IEP team had already determined was not appropriate for the student and because it requires that the student will continue to be subject to the discipline policies that resulted in an improper change of placement. To this extent the IEP is not reasonably calculated to achieve educational benefit.

Id. at p.21, ¶28.

The ALJ also concluded that the District's denial of FAPE to M.M. resulted in a loss of educational benefit to M.M., and that compensatory

---

[9] It appears that the IEP, which is being referenced by the ALJ, actually was issued on March 9, 2005, as opposed to March 9, 2004.

educational services were required so as to address the loss of educational benefit. Id. at p.22, ¶33.

In other respects, the ALJ determined that the District had complied with the requirements of the IDEA. Specifically, the ALJ found that the District conducted appropriate re-evaluations of M.M., in November of 2003, and December of 2004, id. at p. 20, 15; that the District appropriately considered L.R.'s input in conducting its re-evaluations of M.M., id. at p. 20, ¶19; that the District obtained informed parental consent, or took reasonable measures to obtain such consent before conducting reevaluations of M.M., id. at p. 21, ¶21; that the District had an IEP in place at the beginning of each school year, id. at p. 21, ¶25; that, in recommending a Setting III placement, the District did not fail to provide M.M. with necessary supplementary aids and services in the least restrictive environment, id. at p. 21, ¶27; and that the classrooms and facilities provided by the District established an environment that was conducive to learning. Id. at p. 22, ¶31. The ALJ also concluded that, as of the date of the decision, the Setting III program at Barton Open School was the least restrictive environment for M.M. Id. at p. 21, ¶29.

Based upon her findings, the ALJ instructed the District to convene M.M.'s IEP team as soon as possible, in order to develop an IEP that was based upon M.M.'s current levels of performance; to retain Ostrom to consult with the IEP team to revise the student's BIP, in order to allow for revisions of the District's city-wide disciplinary policy; to place M.M.

at the SPAN program at Barton Open School, in the absence of an alternative agreement between the parties; and to provide M.M. with compensatory educational services in the amount of twenty (20) hours for the 20032004 school year, 168 hours for the 2004-2005 school year, and an additional 330 minutes of compensatory education services pursuant to the mediation agreement. Id. at pp. 22-23.

As noted, the District has appealed the ALJ's decision in all respects, except as to the placement of M.M. in the Barton Open program, and specifically, the ALJ's award of compensatory benefits for the 2003-04, and 2004-05 school years, while the Plaintiffs seek an award of costs and attorney's fees, as the "prevailing party" in the underlying action. Since our determination of the District's appeal has potential implications on the Plaintiff's entitlement to an award of costs and attorneys fees, we will address the District's Motion for Summary Judgment first, before proceeding to the Plaintiff's request for costs and attorney's fees.

III. Discussion

A. The District's Motion for Summary Judgment.

1. Standard of Review. "Under the IDEA, a party may appeal from the state administrative proceedings to a federal district court." School Board of Independent School District No. 11 v. Renollett, 440 F.3d 1007, 1010 (8th Cir. 2006), citing Title 20 U.S.C. §1415(i)(2). Under this form of review, "[t]he district court must review the state administrative

record, hear additional evidence, if requested, and grant such relief it deems appropriate, basing its decision on the preponderance of the evidence." Id. "Judicial review of agency action may be conducted on the administrative record even if there are disputed issues of material fact." Independent School District No. 283 v. S.D., 88 F.3d 556, 561 (8th Cir. 1996).

Although this is "a less deferential standard of review than the substantial evidence test common to federal administrative law[,] * * * it still requires the reviewing court to give 'due weight' to agency decision-making." Id.; see, Blackmon ex. rel Blackmon v. Springfield R-XII School District, 198 F.3d 648, 654 (8th Cir. 1999); see also, Bradley ex rel. Bradley v. Arkansas Dept. of Education, 443 F.3d 965, 974 (8th Cir. 2006). "The district court must give 'due weight' because the [ALJ] had an opportunity to observe the demeanor of the witnesses and because the court should not substitute its own educational policy for those of the school authorities that they review." CJN v. Minneapolis Public Schools, 323 F.3d 630, 636 (8th Cir. 2003); see, Stringer v. St. James R-1 School District,446 F.3d 799, 803 (8th Cir. 2006); Bradley ex. rel Bradley v. Arkansas Dept. of Education, supra at 974. "Judicial review of the [ALJ's] decision under the IDEA is limited because judges are not trained educators." Nygren v. Minneapolis Public Schools, 2001 WL 1690048 at *3 (D. Minn., December 14, 2001).

2. Legal Analysis. The District's Motion for Summary Judgment seeks a reversal of the decision of the ALJ, to the extent that the ALJ determined

that she had jurisdiction over claims which pre-dated M.M.'s temporary transfer outside of the District in September of 2004, as well as the ALJ's award of compensatory educational benefits. In so urging, the District identifies several different errors in the ALJ's determination including: 1) the All's assignment of the burden of proof at the Administrative Hearing; 2) the ALJ's determination that M.M.'s enrollment at the Colonel Charles Young Military Academy, for a three-week time period, did not preclude compensatory educational benefits for time periods that preceded the transfer; 3) the ALJ's determination that the mediation agreement did not preclude an award of compensatory educational benefits for the 2004-05 school year; and 4) the ALJ's determination that the District denied M.M. a FAPE, and the resultant award of compensatory education benefits. The District also contends that a Default Judgment against the Plaintiff is appropriate as to the District's Counterclaim. We address each of these contentions, in turn.

A. Default Judgment. The District contends that a Default Judgment must be entered against the Plaintiff since the Plaintiff failed to Answer its Counterclaim until January 26, 2006, which was approximately eighteen (18) days after the time period allowed under the Federal Rules of Civil Procedure.[10] "When a party `has failed to plead or

---

[10] Our review of the file discloses that the District filed its Answer and Counterclaim on December 18, 2005, and an Amended Answer and Counterclaim on December 29, 2005. Rule 12(a)(2), Federal Rules of

defend' against a pleading listed in Rule 7(a), entry of default under Rule 55(a) must precede grant of default judgment under Rule 55(b)." Johnson v. Allied Interstate, Inc., 2002 WL 1906024, at *2 (D. Minn., August 19, 2002), quoting Johnson v. Dayton Electric Manufacturing Co., 140 F.3d 781, 783 (8th Cir. 1998). Thus, as an initial matter, the District's failure to obtain an entry of default, under Rule 55(a), as to its Counterclaim, combined with the fact that the Plaintiff has now filed responsive pleadings, weighs

---

Civil Procedure, requ a Reply to a Counterclaim be served within twenty (20) days after service of the Answer and Counterclaim, and, where an Amended Answer and Counterclaim is filed, Rule 15(a), Federal Rules of Civil Procedure, provides that "[a] party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer." Applying those Rules here, the Plaintiffs Reply to the District's Counterclaim should have been served by no later than January 8, 2006.ires that a Reply to a Counterclaim be served within twenty (20) days after service of the Answer and Counterclaim, and, where an Amended Answer and Counterclaim is filed, Rule 15(a), Federal Rules of Civil Procedure, provides that "[a] party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer." Applying those Rules here, the Plaintiffs Reply to the District's Counterclaim should have been served by no later than January 8, 2006.

against the District's request for a Default Judgment. See, Johnson v. Allied Interstate, Inc., supra at *2.

Furthermore, even if we overlook the District's failure to obtain an entry of default, a Default Judgment, under the circumstances presented here, would be improper. Notably, Rule 55(c) allows the Court to set aside an entry of default "for good cause shown," or "in accordance with Rule 60(b)," which in turn provides that a Judgment may be set aside upon a showing of "mistake, inadvertence, surprise, or excusable neglect." "[W]hether conduct is excusable is an equitable determination that `tak[es] account of all relevant circumstances surrounding the party's omission.' Johnson v. Dayton Electric Manufacturing Co., supra at 784, citing Pioneer Investment Services v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993).

Guided by Johnson v. Dayton Electric Manufacturing Co., the following factors are of principal consideration: 1) "the blameworthiness of the defaulting party;" 2) whether the defaulting party has presented a meritorious defense; and 3) prejudice to the non-defaulting party. Id. at 784-785. "[P]rejudice may not be found from delay alone or from the fact that the defaulting party will be permitted to defend on the merits." Id. at 785. Instead, the asserted prejudice must be "concrete," such as "loss of evidence, increased difficulty in discovery, or greater opportunities for fraud and collusion." Id., quoting Berthelson v. Kane, 907 F.2d 617, 621 (6th Cir. 1990). Such considerations reflect the "judicial preference for adjudication on the

merits." Id. at 784, citing Oberstar v. F.D.I.C., 987 F.2d 494, 504 (8th Cir. 1993).

Considering the factors identified in Dayton Electric, the District has failed to demonstrate that a Default Judgment against the Plaintiff, on the District's Counterclaim, would be proper. Specifically, the District has not demonstrated that the Plaintiffs failure to file a timely responsive pleading was a gesture of bad faith, or was otherwise intended to delay the proceedings, see, Forsyth v. Hales, 255 F.3d 487, 490 (8th Cir. 2001)(while "[d]efault judgment is appropriate where the party against whom the judgment is sought has engaged in willful violations of court rules, contumacious conduct, or intentional delays * * * [it] is not an appropriate sanction for a marginal failure to comply with time requirements."), and, in any event, the District has not identified any prejudice that has resulted from the Plaintiff's untimely response. See, Johnson v. Allied Interstate, Inc., supra at *2 (responsive pleading that was filed sixty-four (64) days after deadline did not warrant a default judgment, in the absence of concrete prejudice). Therefore, we recommend that the District's request that Default Judgment be entered against the Plaintiff, on its Counterclaim, be denied.

b. The Burden of Proof. Under Minnesota law, "[t]he burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment." See, Minnesota Statutes Section

125A.091, Subdivision 16. Relying on this provision, the ALJ placed the burden of proof on the District to demonstrate that it had provided M.M. with a FAPE, in the least restrictive environment. The District now asserts that Section 125A.091, Subdivision 16, has been preempted by the IDEA, as the IDEA was interpreted in the recent decision of the United States Supreme Court, in Schaffer v. Weast, --- U.S. ---, 126 S.Ct. 528 (November 14, 2005), and, as a result, the ALJ's assignment of the burden of proof was improper.

The issue before the Court, in Schaffer, was whether the IDEA placed the burden of proof, at an Administrative Hearing, on the school district. The Court answered this question in the negative, holding that "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed on the party seeking relief." Id. at 537. In so holding, the Court noted that the IDEA was silent concerning the burden of proof at Administrative Hearings, and that, under the "default rule," the burden of persuasion typically falls upon the party seeking relief. Id. at 535, 537.

The Court also noted that several States, including Minnesota, have laws or regulations which place the burden of proof at the administrative hearing on the school district. However, the Court explicitly declined to address the issue that is presently before us: whether "States may * * * override the default rule and put the burden always on the school district," since the defending school district in that action was located in the State of

Maryland, which did not have a statute or regulation that imposed such a burden on a school district. Id. at 537.

"Placing the burden of proof on the incorrect party is reversible error." West Platte R-II School District v. Wilson, 439 F.3d 782, 785 (8th Cir. 2006). Prior to Schaffer, the law in this District, and Circuit, provided that, "[alt the administrative level, the District clearly ha[s] the burden of proving that it had complied with the IDEA," E.S. v. Independent School District, No. 196, 135 F.3d 566, 569 (8th Cir. 1998); see, Pachl ex rel. Pachl v. Seagren, 2005 WL 1140618 at *4 (D. Minn., May 11, 2005). However, relying on Schaffer, our Court of Appeals has recently determined that the burden of proof at an administrative hearing was improperly placed on a school district. See, West Platte R-II School District v. Wilson, supra at 785; School Board of Independent School District No. 11 v. Renollett, supra at 1011, n. 3.

The circumstances before the Court in West Platte are clearly distinguishable from those which are presented here. Specifically, the Court, in West Platte, was operating under the IDEA framework that had been established by Missouri law, as opposed to Minnesota law. Unlike Minnesota, Missouri does not appear to have any statute or regulation that allocates the burden of proof in a Due Process Administrative proceeding and, as a result, the Schaffer holding was directly applicable. Here, however, the question raised is precisely the one that the Court in Schaffer refused to decide; namely,

whether "States may * * * override the default rule and put the burden always on the school district."

However, as is the case here, the Court, in School Board of Independent School District No. 11 v. Renollett, supra, was operating under the IDEA framework adopted by the State of Minnesota and, while the allocation of the burden of proof was immaterial to the outcome of the case before it, the Court made the following observation:

> In Schaffer ex rel. Schaffer v. Weast, the Supreme Court held that the burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district. --- U.S. ----, ----, 126 S.Ct. 528, 537, 163 L.Ed.2d 387 (2005). At the time of the administrative proceedings in this case, however, the law in our Circuit placed the burden on the school district. E.g.,Blackmon ex rd. Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 658 (8th Cir.1999); E.S. v. Indep. Sch. Dist., No. 196, 135 F.3d 566, 569 (8th Cir.1998). Here, [the student] sought relief, and the burden of persuasion was placed on the District. In light of Schaffer, it was error to place the burden on the District, but the error was harmless because the District prevailed.

Id. at 1011, n. 3.

In making this observation, the Court did not reference the statutory allocation of the burden of

proof set forth in Minnesota Statutes Section 125A.091, Subdivision 16, and it is unclear whether the Court was ever made aware of that statutory provision through the arguments of counsel, or through its own independent research. Moreover, the Court did not address the express decision of the Court, in Schaffer, not to consider circumstances, such as those which exist in Minnesota, where the State has chosen to statutorily allocate the burden of proof.

By way of contrast, a Court in this District, in a decision that pre-dated Renollett, determined that the rule in Schaffer was inapplicable under Minnesota law, providing as follows:

> In the proceedings before the ALJ, the burden was placed on the District. (Decision at 10.) While this appeal was pending, the Supreme Court held that the "burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief" Schaffer v. Weast, 126 S.Ct. 528, 537 (2005). However, the Schaffer Court declined to address the issue of whether a state could, by statute, place the burden of proof exclusively upon the school district. Id. Minnesota law firmly places the burden in such hearings on the school district. Minn. Stat. §125A.091, subd. 16. (2004). Thus, the Court finds that the holding in Schaffer does not apply here, and the ALJ correctly placed the burden of proof on the District in accordance with Minnesota law.

See, Independent School District No. 701 v. J.T., 2006 WL 517648 at *6, n. 6 (D. Minn., February 28, 2006); see also, Gellert v. District of Columbia Public Schools, --F. Supp.2d ----, 2006 WL 1363851 at *4, n. 3 (D. D.C., May 18, 2006)(finding that Schaffer "does not affect the validity of the District of Columbia's regulation placing the burden of proof at the administrative level on [the school district].").

As a Court of inferior jurisdiction, we do not disregard the guidance of our Court of Appeals, even if the guidance is expressed in dicta. However, given the absence of any discussion concerning the Minnesota statutory framework, or the Supreme Court's express decision not to address a State's authority to statutorily assign the burden of proof, we are unable to attribute to the Court's analysis, in Renollett, an intention to extend the rule in Schaffer to situations where the State has specifically allocated the burden of proof by statute. Accordingly, the Court's cursory discussion in Renollett, where the allocation of the burden of proof was adjudged to be harmless error, does not bind our analysis, and is not persuasive given the express terms of the Minnesota Statute.

Instead, we conclude that a close reading of Schaffer, in conjunction with existing Supreme Court and Eighth Circuit precedent, does not support the IDEA's preemption of Minnesota law on this point. "Congress' intention in enacting the IDEA `was not that the Act displace the primacy of the States in the field of education, but that the States receive funds to assist them in extending their educational systems to

the handicapped.' Little Rock School District v. Mauney, 183 F.3d 816, 830 (8th Cir. 1999), quoting Board of Ed. of Hendrick Hudson Central School Dist v. Rowley, 458 U.S. 176, 208 (1982). Under this method of "cooperative federalism," States have the authority to "establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies." Title 20 U.S.C. §1415(a); see, Schaffer v. Weast, supra at 532 (recognizing that States have the responsibility for establishing fair Hearing procedures); Little Rock School District v. Mauney, supra at 830 ("If a state does choose to participate, authority is vested in state and local bodies to effectuate the legislation's substantive and procedural guarantees.").

Given this framework, so long as the State procedures satisfy the minimum Federal guidelines, they are not preempted by the IDEA. Converse County School District No. Two v. Prat, 993 F. Supp. 848, 855 (D. Wy. 1997), citing Evans v. Evans, 818 F. Supp. 1215, 1223 (N.D. 111. 1993). As was recognized by the Court in Town of Burlington v. Department of Education of the Commonwealth of Massachusetts, 736 F.2d 773, 784 (1st Cir. 1984), affirmed, sub nom., School Committee of Town of Burlington v. Department of Education of the Commonwealth of Massachusetts, 471 U.S. 359 (1985):

> While compliance with the minimum standards set out by the federal Act is

> mandatory for the receipt of federal financial assistance * * * the Act does not presume to impose nationally a uniform approach to the education of children with any given disability; it requires only that a "free * * * appropriate education," * * * in conformity with the state's educational standards, * * * be provided to each disabled child upon individualized evaluation and planning. * * * "Cooperative federalism" in this context, then, allows some substantive differentiation among the states in the determination of which educational theories, practices, and approaches will be utilized for educating disabled children with a given impairment. Rowley at 207-08, 102 S.Ct. at 3051-52.

Accordingly, for the purposes of the IDEA "[w]here a state law is more stringent than a federal law the two are consistent and the state law is not subject to federal preemption." Ivan P. v. Westport Board of Education, 865 F. Supp. 74, 79 (D. Conn. 1994), aff'd 101 F.3d 686 (2nd Cir., June 7, 1996); see, Atkowiak v. Ambach, 831 F.2d 635, 641 (2nd Cir. 1988).

The Court, in Schaffer, did not hold that the allocation of the burden of proof on a school district interfered with the substantive guarantees of the IDEA. Rather, the Court recognized that "Congress has never explicitly stated * * * which party should bear the burden of proof at IDEA hearings," and that, "[a]bsent some reason to believe that Congress intended otherwise * * * we will conclude that the burden of persuasion lies where it usually falls, on

the party seeking relief" Schaffer v. Weast, supra at 534-35. As such, in the absence of some evidence that Congress intended to impose the "default rule" onto the States which have assigned the burden of proof differently, we decline to read Schaffer in such a manner as would limit the State's authority to establish more stringent procedures for effectuating the substantive guarantees of the IDEA.

Therefore, since Minnesota law specifically places the burden at an administrative hearing on the school district, we find that the ALJ's allocation of the burden of proof was proper.

c. The ALJ's Jurisdiction to Award Compensatory Benefits for the 2003-04 School Year. The ALJ awarded M.M. twenty (20) hours of compensatory education services for the 2003-04 school year. The District now challenges that award based on L.R.'s decision to voluntarily enroll M.M. in the Colonel Charles Young Military Academy at the beginning of the 2004-05 school year. M.M. was enrolled in the charter school from September 7, 2004, until September 27, 2004, when she re-enrolled with the District. The District urges that, since M.M. did not seek a Due Process Hearing prior to her enrollment in a school outside of the District, she waived any IDEA claim for events that preceded her enrollment. Thus, the District contends that the ALJ erred by awarding M.M. compensatory education benefits for the 2003-2004 school year.

The District's argument is primarily predicated on the analysis of our Court of Appeals in Thompson ex rel. Buckhanon v. Board of Special School District

No. 1, 144 F.3d 574, 579 (8th Cir. 1998). In Thompson, the plaintiffs filed an IDEA claim against the District. However, prior to the plaintiffs' request for a Due Process Hearing, the student was removed from the District by his parents, and enrolled in a charter school. After recognizing that Minnesota law required that a Due Process Hearing "be initiated and conducted by and in the school district responsible for assuring that an appropriate program is provided," id., quoting Minnesota Statutes Section 120.17, Subdivision 3(b)(e),[11] the Court held that the

---

[11] In 2003, Minnesota Statutes Section 120.17, Subdivision 3(b)(e), which had previously been renumbered as Minnesota Statutes Section 125A.09, was repealed. However, under existing Minnesota law:

> A parent or a district is entitled to an impartial due process hearing conducted by the state when a dispute arises over the identification, evaluation, educational placement, manifestation determination, interim alternative educational placement, or the provision of a free appropriate public education to a child with a disability. The hearing must be held in the district responsible for ensuring that a free appropriate public education is provided according to state and federal law. The proceedings must be recorded and preserved, at state expense, pending ultimate disposition of the action.

Minnesota Statute Section 125A.091, Subdivision

transfer was fatal to the plaintiffs' IDEA claim, reasoning as follows:

> Thompson has not stated a cause of action under IDEA because his request for a review comes after he left the District previously responsible for his education. At the time Thompson brought suit, Minnesota law considered a charter school a separate school district. Minn. Stat. § 120.064, subd. 12. IDEA provides a mechanism for challenging the education a student has been provided within a school district. If a student changes school districts and does not request a due process hearing, his or her right to challenge prior educational services is not preserved. Subsequent challenges to the student's previous education become moot because the new school district is responsible for providing a due process hearing.
>
> Contrary to [the plaintiffs'] assertions, her need to preserve the right to challenge [the student's] prior educational services is not simply a procedural barrier. The purpose of requesting a due process hearing is to challenge an aspect of a child's education and to put the school district on notice of a perceived problem. Once the school district receives notice, it has the opportunity to address the alleged problem. Under [the plaintiffs'] theory, a school would be potentially

---

12(a).

> liable for unanticipated costs for alleged problems of which it is totally unaware.

Id. at 578-579

The principles set forth in Thompson were affirmed in Smith ex rel. Townsend v. Special School District No. 1, 184 F.3d 764, 766-67 (8th Cir. 1998), where the Court held that a student who had moved from the Minneapolis school district to the school district for Bloomington, Minnesota, and who was attending school in the Bloomington school district at the time that the Due Process Hearing was requested, did not have a viable action against the Minneapolis school district under the IDEA.

Similarly, in M.P. v. Independent School District No 721, 326 F.3d 975, 981 (8th Cir. 2003), the Court held that a student who changed his enrollment from the school district for New Prague, Minnesota, to the school district for Northfield, Minnesota, but who continued to reside in the New Prague school district, could not maintain an IDEA action against the New Prague school district, when he had failed to request a Due Process Hearing prior to his enrollment in the Northfield school district. M.P. v. Independent School District No. 721, supra at 981.

Despite the urging of the District, the ALJ declined to hold that M.M. had waived her claims by temporarily transferring to the Colonel Charles Young Military Academy. In so holding, the ALJ distinguished Thompson, Smith, and M.P. by noting that M.M. had moved back into the District after only

a short period of enrollment at the charter school, and that she had remained in the District through the time that the Hearing was requested. In so finding, the ALJ noted that Thompson, Smith, an M.P., "were decided not on the basis that the student waived the right to challenge past services by changing districts without requesting a due process hearing, but only on the statutory basis that the student may only request a due process hearing, and thereby exhaust administrative remedies, from the district that is obligated to provide the student with an appropriate education." Kane Aff., Exh. 1, at p. 25.

The District disputes the ALJ's characterization of Eighth Circuit precedent, and urges that the facts, in Smith, are directly analogous. Specifically, the District notes that, in Smith, the Court declined to address the merits of the plaintiff's IDEA claim despite the fact that the student had moved back into the District. Smith ex rel. Townsend v. Special School District No. 1, supra at 768. While that observation is true, the District's reading of Smith is overly broad. In Smith, counsel for the plaintiff advised the Court, without supplementing the record on appeal, that the student had moved back to the Minneapolis District, but that he continued to attend school in Bloomington. The Court assumed the plaintiff's representation to be true, but nonetheless, upheld the dismissal of the IDEA claim upon the observation that "[the student] may now seek relief against Special School District No. 1 based on current conditions, but this is an entirely different claim from that for which [the student] exhausted his administrative remedies and which he presented to

the district court." Id. at 768.

In contrast to Smith, the Plaintiff's request for a Due Process Hearing, here, was made at a time when M.M. was attending school in the District, and when the District was responsible for providing M.M. with a Due Process Hearing. See, Minnesota Statutes Section 125A.091, Subdivision 12(a). Furthermore, unlike the circumstances in Smith, all of the Plaintiff's claims against the District, including those which pre-date the transfer, were administratively exhausted in the proceedings before the ALJ.

In all three cases relied upon by the District, the school district that was responsible for providing the student with a Due Process Hearing, at the time that the Hearing was requested, was different from the school district that was alleged to have deprived the respective students of their FAPE rights. In each of those cases, the Court made note of this fact, which appears to have provided the bases for those decisions. See, M.P. v. Independent School District No 271, supra at 980 ("Subsequent challenges to the student's previous education become moot because the new school district is responsible for providing a due process hearing."), quoting, Thompson ex rd. Buckhanon v. Board of Special School District No. 1, supra 579; Smith ex rd. Townsend v. Special School District No. 1, supra at 767 (same), quoting Thompson ex rel. Buckhanon v. Board of Special School District No. 1, supra 579.

Here, in clear distinction to Smith, Thompson, and M.P., the Plaintiff requested a Due Process Hearing at a time when the District was responsible

for providing M.M. with such a Hearing. This distinction is especially important since, given the relatively brief period of time in which M.M. was enrolled in a school outside of the District, it cannot fairly be said that the ALJ held the District liable for the unanticipated costs of problems with which it was totally unaware. As such, under these circumstances, we concur with the ALJ, that M.M.'s three-week transfer to a school outside of the District, did not constitute a waiver of her right to obtain relief for IDEA violations that pre-dated the transfer.

d. The Mediation Agreement. On March 28, 2005, the parties entered into a Mediation Agreement which provided as follows:

> (1) Regarding placement: parent will visit Barton & update Don Allen by 4/1/05; parent will register [M.M.] for Harry Davis school; Olson (Bill Smart) will set up a transition IEP meeting with Harry Davis prior to 4/18/05; (2) Bill Smart will notify prior to 4/1/05 [M.M.'s] bus driver that she sits in front; (3) the IEP team will address the transitions and modifications to the IEP in the following areas: behavior goals, adaptations, Behavior Intervention Plan, and will determine compensatory education (4) Barbara Muir will follow up with Kim Mesum prior to 4/15/05 regarding compensatory education; (5) Bill Smart will check on the implementation of progress reporting and report to the parent by 4/1/05; (6) Barbara Muir will discuss confidentiality with the administrative team

> prior to 4/1/05 (7) Barbara Muir will send a memo to teachers prior to [illegible date] indicating that [M.M.] has permission to see Dr. Muir or Mr. Smart when she is feeling frustrated & has verbalized the need to her teacher.

[D. 5-6].

Subsequently, the District calculated that M.M. was entitled to 390 minutes of compensatory education for the 2004-05 school year; i.e., fifteen (15) minutes of service, multiplied by twenty-six (26) days. [D. 1].

The District asserts that the Mediation Agreement precludes all compensatory education claims for the 2004-05 school year. The ALJ rejected this argument, reasoning as follows:

> The mediation "agreement," by its own terms, is incomplete. In addition, it does not address the issues for which compensatory relief is provided in this Decision. The district's failure to adequately review and revise the student IEP in March of 2004, and the impact of the serial suspensions on the student's education in the 2004-05 school year was not the subject of mediation, and the parent did not waive her right to compensatory education for those denials of FAPE by failing to raise those issues in mediation.

Kane Aff., Exh. 1, at pp. 25-26.

The District maintains that the ALJ erred in this conclusion, because, it asserts, the claims that were not raised in a mediation should be deemed waived for the purposes of subsequent litigation. In making this argument, the District attempts to analogize the Mediation Agreement to Settlement Agreements, in the context of litigation. Thus, the District asks that we find that the parties mediated, and agreed upon, 390 minutes of compensatory education for any missed services in the 2004-05 school year, through the date of mediation. The Plaintiff counters that the absence of a waiver and release provision in the Mediation Agreement allowed her to seek compensatory education irrespective of the Agreement.

After reviewing the "agreement," the District's argument is clearly without merit. Nothing in the Mediation Agreement reflects that the parties agreed on any amount of compensatory education services that M.M. would receive. Moreover, while Smart's Hearing testimony reflects that he was under the impression that L.R. had agreed with Muir to the proposed number of compensatory minutes, [T. 484], L.R. unequivocally testified that she did not agree to the number of minutes that were proposed by the District. [T. 363-67]. Furthermore, the agreement does not contain any release, nor any other language, which could reasonably be construed as a restriction on the right of the Plaintiff to seek further redress, in the event that she was dissatisfied with the District's proposals.

To the extent that the Mediation Agreement

between the parties can be analogized to a Settlement Agreement, the scope of the "agreement" is necessarily governed by principles of contract law. See, Residential Funding Corp. v. Moore Financial, 2006 WL 618119 at *5 (D. Minn., March 10, 2006)("Settlement agreements are a type of contract and are therefore governed by contract law."). It is a fundamental precept of contract law, that the parties to the contract are only bound by the terms of their agreement. As such, in the absence of an "agreement" between the parties concerning the number of compensatory minutes that would be provided M.M., or that satisfaction of the terms of the Mediation Agreement would preclude the Plaintiff from seeking relief for previous IDEA violations, we agree with the ALJ that the Mediation Agreement does not preclude an additional award of compensatory benefits for the District's IDEA violations.

e. The Violations of the IDEA.

1) Standard of Review. "Insofar as a State is required to provide a handicapped child with a 'free appropriate public education,' the Supreme Court has maintained that a State satisfies that requirement 'by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.' Hendrick Hudson District Board of Education v. Rowley, supra at 203. In delineating the standard by which to measure the adequacy of benefits provided under the IDEA, the Court settled upon a qualitative standard -- namely, that "some benefit" would have to result from the educational process. Id. at 200.

In this respect, "[t]he IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents." Independent School District No. 283 v. S.D., supra at 878-79, quoting Lenn v. Portland School Comm., 998 F.2d 1083, 1086 (Pt Cir. 1993). The IDEA does not require schools to "either maximize a student's potential or provide the best possible education at public expense," but only requires a school to "provide sufficient specialized services so that the student benefits from his education." Fort Zumwalt School District v. Clynes, 119 F.3d 607, 612 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998), citing Hendrick Hudson District Board of Education v. Rowley, supra at 203. "Specific results are not required, 34 C.F.R. §300.350(b), and an IEP need not be designed to maximize a student's potential 'commensurate with the opportunity provided to other children,' see Rowley, 458 U.S. at 189-198." CJN v. Minneapolis Public Schools, supra at 642; see, Bradley ex rel. Bradley v. Arkansas Department of Education, supra at 974.

The IDEA requires that a disabled child be provided with access to FAPE. See, Title 20 U.S.C. §1400(d)(1)(A); see also, Hendrick Hudson District Board of Education v. Rowley, supra at 203; Fort Zumwalt School District v. Clynes, supra at 610. The purpose of the IDEA is to facilitate the provision of "a 'basic floor of opportunity' so that a child with disabilities has access to an individually designed education." Stringer v. St. James R-1 School District, supra at 802, citing Yankton School District v. Schramm, 93 F.3d 1369, 1372 (8' Cir. 1996), citing, in

turn, Hendrick Hudson District Board of Education v. Rowley, supra at 192.

All children with disabilities, including those suffering from a disability of M.M.'s nature, "who, by reason thereof, need special education and related services" are covered by the IDEA's protections. Title 20 U.S.C. §1401(3)(A)(ii). Those protections include "special education" and "related services," where "special education" is "specially designed instruction * * * to meet the unique needs of a child with a disability," while "related services" include "transportation, and such developmental, corrective, and other supportive services * * * as may be required to assist a child with a disability to benefit from special education * * *." Title 20 U.S.C. §1401(26)(A) and (29).

FAPE, under the IDEA, is an educational experience which provides a disabled child with special education and related services that are tailored to that child's unique needs, by means of an IEP. See, Title 20 U.S.C. §1401(14). The IEP must include the child's present educational level and goals, specific services to be provided, needed transition services, and criteria for progress evaluation. See, Title 20 U.S.C. §1414(a)(1)(A). The IDEA is also designed to ensure that parents are afforded a meaningful opportunity to participate in the formulation of the IEP, and receive notice of any proposed changes in their children's educational programs. See, Title 20 U.S.C. §§1400(c)(5)(B) and 1414(a)(1)(D).

A parent who disagrees with a proposed IEP, or otherwise believes that his or her child's education falls short of the Federal standard, is entitled to a State Administrative Hearing. See, Title 20 U.S.C. §1415(f); see also, Fort Zumwalt School District v. Clynes, supra at 610. Under the IDEA, the administrative process is governed by State law. See, Independent School District No. 283 v. S.D., supra at 560. "Ultimately, after exhausting all administrative remedies provided by State law, an aggrieved party may file a civil action in State or Federal Court, to have the administrative determination judicially reviewed." *Id.*

2) Legal Analysis. Aside from the arguments that were previously addressed, the District has directly challenged the ALJ's finding that "the district ha[d] not offered or made available to the child a free appropriate public education in the least restrictive environment and the child suffered a loss of educational benefit." See, Minnesota Statutes Section 125A.09, Subdivision 21. Our review of the ALJ's determination is necessarily deferential, as we are required to "give `due weight' to the results of [the administrative proceedings], resisting any impulse to 'substitute [our] own notions of sound educational policy for those of the school authorities.'" E.S. v. Independent School District, No. 196, supra at 569, quoting Hendrick Hudson District Board of Education v. Rowley, supra at 206.

The ALJ determined that the District had deprived M.M. of a FAPE in several different respects. Specifically, the ALJ determined that the

repeated suspensions of M.M., between January and April of 2005, constituted a change in placement, in violation of Title 20 U.S.C. §1415(j); that the District failed to provide services to the extent necessary to enable M.M. to appropriately progress in the general curriculum, and appropriately advance towards achieving the goals set forth in her IEP; that the District failed to review and revise M.M.'s IEP in March of 2004, when M.M. was transferred from Lucy Laney to Olson Middle School, and between January of 2005 and April of 2005; that the District failed to provide L.R. with written notice before eliminating M.M.'s speech services, in violation of Title 20 U.S.C. §1415(b)(3); and that the proposed IEP of March 9, 2005, was not reasonably calculated to achieve educational benefit, since it called for the placement of M.M. at the Jordan Park program, and since it required that M.M. continue to be subjected to the District's city-wide disciplinary policy.

The ALJ further concluded that the District's failings had resulted in a loss of education benefit to M.M., and that compensatory education services were necessary. In determining the amount of compensatory services that were required for the 200304 school year, the ALJ noted that, in the fall of 2004, M.M.'s IEP called for 120 minutes of services a day and, as such, the loss of ten (10) days of school would translate to twenty (20) hours of special education services. The ALJ's calculation appears to be predicated on her fording that "[i]t is a fair inference from the record that [M.M.] had more than ten days of suspension in the 2003-04 school year, and that the suspensions were numerous enough to

impact her education." Kane Aff., Exh. 1, at p.6, ¶16.

The District contends that such a conclusion was in error since the Plaintiff failed to satisfy her burden concerning the suspensions, and that the ALJ could have ordered the District officials to testify concerning such suspensions. The District also contends that it was entitled to rely on Thompson, Smith, and M.P., and that, as a result, it could not have been required to proffer evidence concerning events which pre-dated M.M.'s re-enrollment in the District for the 2004-2005 school year.

As an initial matter, we conclude that the ALJ's finding, that M.M. was suspended for more than ten (10) days during the 2003-04 school year, is adequately supported by a preponderance of the evidence in the Record. Specifically, the Administrative Student Transfer Form, which is dated March 4, 2004, reflects that M.M. was suspended from February 13, 2004, until March 2, 2004, for a total of ten (10) school days. [D. 292, 666]. It also reflects that the suspension was M.M.'s second during the 2003-04 school year. Furthermore, the FBA, which was conducted on December 13, 2004, reveals that M.M. had received twelve days of out-of-school suspension during her enrollment at Olson Middle School, [D. 227], and other records reflect that, as of December 13, 2004, only six (6) of those suspensions had occurred during the 2004-05 school year. [D. 708, S. 199, 211]. As such, the Record demonstrates that M.M. was suspended for a minimum of sixteen (16) days during the 2003-04 school year.

The District has also challenged the All's finding that the suspensions were numerous enough to impact upon M.M.'s education. In support of the challenge, the District draws our attention to a Progress Report of June 1, 2004, which shows that M.M. made adequate academic progress during the 2003-2004 school year. [D. 306] However, as referenced by the ALJ, the Report also reflects that M.M. made insufficient progress in her behavioral goal, and that absences due to suspensions were detrimental to M.M.'s learning. [D. 306]. Accordingly, while there is certainly evidence that M.M. made academic progress during the 2003-04 school year, the ALJ's conclusion, that the suspensions were numerous enough to impact upon M.M.'s education, is supported by a preponderance of the evidence.

That being said, compensatory benefits are only proper where the ALJ "finds that the district has not offered or made available to the child a free appropriate public education in the least restrictive environment and the child suffered a loss of educational benefit." Minnesota Statutes Section 125A.091, Subdivision 21. Accordingly, any award of compensatory benefits must be predicated on a failure of the District to satisfy its FAPE obligations. As it pertains to the award of compensatory benefits for the 2003-04 school year, the ALJ determined that the District deprived M.M. of a FAPE when it failed to review and revise M.M.'s IEP in March of 2004, following the suspension which had resulted in M.M. being transferred from the Lucy Laney Community

School to Olson Middle School.[12]

The IDEA requires that the IEP team for a student with disabilities "review[ ] the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and * * * revise[] the IEP as appropriate to address * * * any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." Title 20 U.S.C. §1414(d)(4)(A); see, 34 C.F.R. §300.343(c)(2). "The federal courts have said little on the failure to revise programs, but the school district is required to revise programs as appropriate." Kings Local School District, Board of Education v. Zelazny, 325 F.3d 724, 731 (6th Cir. 2003)[emphasis in original].

No progress reports appear in the Record for the time period between the implementation of M.M.'s IEP and BIP, on or around November 19, 2003, and M.M.'s transfer to the Olson Middle School,

---

[12] The District contends that there is insufficient evidence, in the Record, to support a finding that the suspensions during the 2003-04 school year were numerous enough to constitute a change of placement, without parental consent, in violation of Title 20 U.S.C. §1415(j). However, we do not read the ALJ's opinion to make such a finding. On the contrary, the ALJ observed that incomplete disciplinary records rendered it impossible to determine whether the suspensions, that occurred in the Spring of 2004, amounted to a change of placement. Kane Aff., Exh. 1, at ¶10.

nor is there other sufficient evidence that M.M. was progressing appropriately towards her goals during that time. Instead, the Record reflects that, at the time of M.M.'s transfer to Olson Middle School, she had been suspended in excess of ten (10) days, and that her IEP team had determined that her placement at the Lucy Laney Community School was inappropriate. In making that determination, the District did not re-evaluate M.M.'s IEP, or her BIP, nor did the District engage in any evaluation as to where an appropriate placement for M.M. would be. Given this Record, we agree with the ALJ that, between the implementation of the IEP of November 19, 2003, and M.M.'s administrative transfer to Olson Middle School, M.M. was failing to make adequate progress towards the goals of her IEP, and the District violated her FAPE rights when it did not review and revise M.M.'s IEP prior to the transfer. Our conclusion is further supported by evidence tending to show that M.M. received approximately six (6) days of suspension between the time of her transfer, and the end of the 2003-04 school year, and that the absences, which arose from the suspensions, interfered with M.M.'s learning.

The Record is devoid of any attendance records, or records of suspensions, that would clearly document when, and for how long, M.M. was suspended following the failure of the District to review and revise M.M.'s IEP in March of 2004. Other evidence is conflicting as to the number of days that M.M. was suspended during that time period. Notably, L.R. testified at the Hearing that, following the transfer, M.M. continued to be suspended on a

weekly basis, and that the periods of suspension would range from two (2) to five (5) days, [T. 305], while the FBA of December 13, 2004, when read in conjunction with the suspension records for the 2004-05 school year, suggest that M.M. was suspended for a total of six (6) days between her transfer to Olson Middle School, and the end of the 2003-04 school year. By all appearances, the ALJ estimated that the District's failure to review and revise M.M.'s IEP, prior to the administrative transfer to Olson Middle School, resulted in M.M. being subjected to ten (10) days of suspension.

Based on the testimony of L.R., the Progress Report of June 1, 2004, the FBA of December 13, 2004, and the absence of any affirmative evidence, such as attendance records, that M.M. was not suspended between March of 2004, and the end of the 2003-04 school year, we are satisfied, by a preponderance of the evidence, that M.M. was suspended following her transfer to the Olson Middle School in March of 2004, and that M.M. suffered a loss of educational benefit as a result. However, in the absence of any additional evidence, we are in no better position than the ALJ to determine the number of days that M.M. was suspended between March of 2004, and the end of the 2003-04 school year.

While we share the ALJ's frustration with the inadequacy of the Record -which places us in the tenuous position of attempting to glean the number of days that M.M. was suspended following her transfer of March of 2004, from seemingly incomplete records

-- we are satisfied that the representations which were made in the FBA Report of December 13, 2004, constitute an accurate assessment of M.M.'s history of suspensions during her enrollment at Olson Middle School, at that time.[13] [D. 227]. Reading this document -- which states that, at that time, M.M. had received twelve (12) days of out-of school suspension during her enrollment at Olson Middle School -- in conjunction with other records of suspension for the 2004-05 school year, [D. 708, S. 199, 211] -- which reflect that six (6) of those suspensions occurred during the 2004-05 school year -- we find, by a preponderance of the evidence, that M.M. was suspended for a total of six (6) days between the time of her transfer to Olson Middle School, and the end of the 2003-04 school year. Accordingly, we recommend that the ALJ' s award of twenty (20) hours of

---

[13] While not explicitly stated, the ALJ's award of compensatory benefits for ten (10) days of suspension during the 2003-04 school year strongly suggests that she did not credit L.R.'s testimony concerning the frequency of the suspensions. According to L.R.'s testimony, M.M. was suspended for anywhere from two (2) to five (5) days each week that she was enrolled at the Olson Middle School during the Spring of 2004, and that, M.M. only attended approximately sixty (60) days of school during the entire 2003-04 school year. [T. 305-306]. Recognizing that the ALJ had an opportunity to observe the demeanor of L.R., and the other witnesses, we decline to credit L.R.'s testimony as articulating an accurate reflection of the frequency of M.M.'s suspensions.

compensatory education benefits, for the 2003-04 school year, be modified to twelve (12) hours of benefits.

The ALJ also awarded M.M. 168 hours of compensatory education benefits for suspensions which occurred between January and April of 2005. The ALJ's award was predicated on her finding that M.M. had been suspended for approximately thirty-eight (38) days during the 2004-05 school year, and that the repeated suspensions of M.M., between January of 2005, and April of 2005, constituted a change of placement without parental consent, in violation of 20 U.S.C. §1415(j). The ALJ calculated the award by multiplying the 360 daily minutes of special education services, that M.M. would have been entitled to in a Federal Setting III program, by the approximately twenty-eight (28) days of suspension which occurred between January and April of 2005.[14]

---

[14] The Record contains conflicting accounts of the number of days that M.M. was suspended between January and April of 2005. [D. 708-09, S. 199, 211]. The testimony of Smart reflects that D. 708 is inaccurate to the extent that it reports that M.M. received homebound instruction from January 6, 2005, through January 20, 2005, [T. 127-128], and S. 199 does not include the suspension of January 21, 2005. Furthermore, S. 199 reflects that M.M. was suspended for two (2) days on February 28, 2005, while S. 211 suggests that the February 28 suspension lasted three (3) days, and D. 709 provides that M.M. was only suspended for one (1) day on

Title 20 U.S.C. §1415(j) requires that, "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child." A change of placement occurs if removal from school lasts more than ten (10) consecutive days, or if the child is subjected to a series of removals that constitute a pattern because they accumulate to more than ten (10) days, and because of factors such as the length of each removal, the total amount of time that the child is removed, and the proximity of the removals to each other. 34 C.F.R. §300.519. The ALJ explicitly found that "[t]he repeated suspensions of M.M. for less than ten days between January 2005 and April 2005 constitute a pattern because they cumulate to approximately 30 days and because the length of each removal, the total amount of time that the student was removed, and the proximity of the removals to one another," and that "[t]hese repeated suspensions constitute a change of placement made by the district without the consent of the parent, in violation of 20 U.S.C. §1415(j)." Kane Aff., Exh. 1, at p. 19, 11.

February 28. Given those inconsistencies, it appears that M.M. was suspended anywhere from twenty-five (25) to thirty (30) days between January and April of 2004. Since neither party has challenged the ALJ's finding, as to the number of days that M.M. was suspended during this time period, we defer to the ALJ's finding that M.M. was suspended for twenty-eight (28) days between January and April of 2005.

The ALJ also noted that 34 C.F.R. §300.121(d) requires the District to provide certain services for periods of suspension that exceed ten (10) days. In pertinent part, Section, 300.121(d)(2), provides as follows:

> In the case of a child with a disability who has been removed from his or her current placement for more than 10 school days in that school year, the public agency, for the remainder of the removals, must –
>
> (i) Provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP, if the removal is –
>
> (A) Under the school personnel's authority to remove for not more than 10 consecutive school days as long as that removal does not constitute a change of placement under § 300.519(b) (§ 300.520((a)(1)); or
>
> (B) For behavior that is not a manifestation of the child's disability, consistent with §300.524.

The ALJ concluded that, despite her numerous suspensions, M.M. did not receive homebound instruction between January of 2005, and April of 2005. Furthermore, the ALJ determined that the

District should have considered Setting III program alternatives outside of the District, in January of 2005, when the IEP team determined that placement in the Jordan Park program was not appropriate. [T.121, 555-56].

The District's challenge to the ALJ's award of compensatory educational benefits for the 2004-05 school year is predicated, in part, on its assertion that it did not place M.M. in the Barton Open program because of L.R.'s persistent refusal to consent to placement in a Setting III program, and that its failure to provide homebound services for M.M. was a result of the absence of an agreement with L.R. concerning the number of hours of service per day. The District further maintains that the ALJ's determination, that M.M. was denied a FAPE by the District's persistent recommended placement of M.M. in the Jordan Park program, was not supported by evidence in the Record, and specifically, the assessment that was conducted by Ostrom. Lastly, the District urges that, in determining that the District had failed to provide M.M. with a FAPE, the ALJ failed to consider testimony from District officials that an IEP team could modify the District's city-wide discipline policy for M.M.

Despite the District's arguments, we concur with the ALJ's conclusion that the District failed to provide M.M. with an FAPE between the months of January and April of 2005. As noted by the ALJ, despite the District's conclusion that the least restrictive environment in which M.M. could be successful was a Setting III placement, the only

Setting III placement that the District offered to M.M. was the Jordan Park program. However, the Hearing testimony of Smart and Allen reflects that Smart, and possibly other members of M.M.'s IEP team, had concluded that Jordan Park would not be an appropriate placement for M.M., due to the high ratio of male to female students in that program, and M.M.'s history of sexually inappropriate behavior towards boys. [T. 121-122, 556]. Accordingly, while a parent's refusal to agree to an appropriate placement might limit a finding that a school district denied a student an FAPE, see, e.g., CJN v. Minneapolis Public Schools, supra at 640, such a finding is inapplicable here, since the District never formally proposed an appropriate placement for M.M.

We are also unpersuaded by the District's argument that the ALJ failed to consider testimony from District officials that the District's city-wide discipline policy may be modified to meet the needs of individual students. As an initial matter, we acknowledge Smart's testimony that, during an IEP team meeting of August 5, 2005, Sue Martin, who was apparently knowledgeable about the Barton Open program, advised that the program followed the District's discipline policy, but that the policy could be modified to the needs of the child. [T. 446-48]. We also note that Allen similarly testified that the behavior policy at Barton Open would follow the city-wide disciplinary policy, but with adaptations or modifications as appropriate for the student. [T. 523]. However, Smart also testified that there was no discussion during the IEP team meeting about modifying the discipline policy for M.M., [T. 448], and

in any event, each of the District's proposed IEPs, between January and April of 2005, clarified that M.M. would be expected to follow the District's city-wide disciplinary policy, although the length of the suspensions could be modified. [D. 158, 180].

Based on our review of the Record, and affording "due weight" to the findings of the ALJ, we concur with the ALJ that the preponderance of evidence supports a finding that the District failed to provide M.M. with a FAPE between the months of January and April of 2005. Specifically, we agree with the ALJ's conclusion that, by only offering the Jordan Park program, the District failed to provide M.M. with a sufficient level of services to receive a benefit from her education, and that the repeated suspensions during that time period constituted a change of placement without parental consent, in violation of Title 20 U.S.C. §1415(j). Therefore, we find that the ALJ properly awarded 168 hours of compensatory education to M.M. for the suspensions which occurred between January and April of 2005.[15]

---

[15] In addition to the compensatory benefits discussed above, the ALJ awarded M.M. 330 minutes of compensatory benefits, which represents the remaining benefits that the District had agreed to provide M.M. as a result of the mediation. The District has not articulated any ground upon which this award of benefits should be reversed and, therefore, our recommended award of benefits will include the 330 minutes of compensatory benefits that the District had previously agreed to provide to M.M.

In sum, we conclude that the ALJ appropriately placed the burden of proof at the Administrative Hearing on the School District, in accordance with Minnesota law, and that the ALJ did not err in awarding compensatory benefits for FAPE violations which occurred prior to M.M.'s temporary transfer to the Colonel Charles Young Military Academy in September of 2004. Additionally, we concur with the conclusion of the ALJ that the District deprived M.M. of an FAPE in March of 2004, when it administratively transferred M.M. to Olson Middle School without conducting an appropriate review of M.M.'s IEP, and again, in January of 2005, when it failed to offer an appropriate placement for M.M. As a result of the District's failings, M.M. was suspended for approximately six (6) days in the Spring of 2004 -- which was after she had already been suspended in excess of ten (10) days during the 2003-04 school year -- and approximately twenty-eight (28) days between the months of January and April of 2005. Therefore, we recommend that the District's Motion be granted, in part, such that the ALJ's award of twenty (20) hours of compensatory benefits for the 2003-04 school year be reduced to twelve (12) hours, and that the Motion be denied in all other respects.

B. The Plaintiffs Motion for Costs and Attorney's Fees.

1. Standard of Review. Section 1415(i)(3)(B)(i) governs the award of attorneys fees in actions to enforce rights under the IDEA and, in this respect,

provides as follows:

> In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys fees as part of the costs * * * to a prevailing party who is the parent of a child with a disability.

A claim for attorneys' fees under the IDEA "is similar to the civil rights attorney's fees award statute, 42 U.S.C. § 1988," and "should ordinarily be awarded to the prevailing party unless 'special circumstances exist to make an award unjust.'" Borengasser v. Arkansas State Board of Education, 996 F.2d 196, 199 (8th Cir. 1993); see, Peter By and Through Peter v. Wedl, 18 F. Supp.2d 1002, 1018 (D. Minn. 1998). Moreover, a party need not succeed on the main issue of the litigation to be considered as having "prevailed." Rather, "to qualify as a 'prevailing party' a plaintiff must obtain 'actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff' John T. ex rel. Robert T. v. Iowa Department of Education, 258 F.3d 860, 863-64 (8th Cir. 2001), quoting Farrar v. Hobby, 506 U.S. 103, 111-12 (1992). "A party prevails if it succeeded on any significant issue which achieved some of the benefit it sought." Yankton School District v. Schramm, 93 F.3d 1369, 1377 (8th Cir. 1996).

Nevertheless, "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." Hensley v. Eckerhart, 461

U.S. 424, 433 (1983); see also, Johnson v. Bismarck Public School District, 949 F.2d 1000, 1003 (8th Cir. 1991). In making this determination, the "most critical factor is the degree of success obtained." Hensley v. Eckerhart, supra at 436; see also, Farrar v. Hobby, supra at 1114. In this respect, the Supreme Court has explained:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.

Hensley v. Eckerhart, supra at 436-37.

Moreover, the IDEA's fee-shifting provision permits the Court to reduce the fee award if a party unjustifiably rejects an offer of settlement, or unreasonably protracts the litigation. Title 20 U.S.C. §1415(i)(3)(D), (E) and (F).

2. Legal Analysis. The Plaintiff's Motion seeks attorney's fees and costs in the amount of $47,899.70, in addition to pre- and post judgment interest in the amount of six (6) per cent, as the "prevailing party" in the underlying administrative action. According to counsel for the Plaintiff, she expended 137.25 hours on behalf of the Plaintiff for the Administrative proceedings, at a rate of $250.00 per hour. Amended Affidavit of Margaret O'Sullivan Kane ("Amended Kane Aff."), at ¶3. Additionally, counsel for the Plaintiff avers that a law clerk expended four (4)

hours, at a rate of $100.00 per hour; a paralegal expended 8.5 hours, at a rate of $75.00 per hour; and that she incurred costs amounting to $216.20. Id. Thus, the total amount that is being sought for the prosecution of the Plaintiff's action at the administrative level is $35,566.20.

The Plaintiff also seeks costs and attorney's fees incurred in prosecuting her Petition for attorney's fees, and in defending against the District's appeal of the ALJ's award. Specifically, counsel for the Plaintiff attests that she expended 47.5 hours,[16] in the prosecution of the pending fee Petition, and in defending against the District's appeal; that a paralegal expended .5 hours; and that she incurred costs amounting to $421.00, for a total of $12,333.50. Id., at ¶4.[17] Counsel for the Plaintiff further avers that, of the $12,333.50, $3,187.50 in

---

[16] The invoices that were submitted in support of counsel for the Plaintiff's claimed hours reflect that counsel for the Plaintiff expended 45.5, as opposed to 47.5 hours in prosecuting the pending fees Petition and defending against the District's appeal. See, Amended Kane Aff., at Exh. 2.

[17] The fourth paragraph of the Amended Affidavit of Margaret O'Sullivan Kane was misnumbered as a second paragraph 3, and each subsequent paragraph appears to have been sequentially misnumbered. All citations to the averments that are contained in this Affidavit will reflect the actual paragraph number, as opposed to the number which appears on the document itself.

attorney's fees -- 12.75 hours x $250.00 -- were incurred in the preparation, writing, and submission of the Plaintiff's Motion for Attorney's Fees and Costs, and the supporting Motion papers.

The District opposes the Plaintiffs Motion on the ground that it, rather than the Plaintiff; was the prevailing party on the central issue of the administrative proceeding -- namely, the placement of M.M. in a Setting III program. The District also contends that, aside from the award of compensatory education benefits, the Plaintiff gained little through the administrative proceedings. Specifically, the District maintains that the ALJ's direction for the District to revise M.M.'s IEP, and to retain Ostrom for the purposes of revising M.M.'s BIP, cannot provide a basis for an award of attorney's fees and costs, since the District was already consulting with Ostrom, and since M.M.'s IEP would have been revised irrespective of the ALJ's ruling, as a result of any change in placement.

In support of its argument, the District relies heavily on the analysis of our Court of Appeals in Johnson v. Bismark Public School District, 949 F.2d 1000 (8th Cir. 1991), and that of the Court of Appeals for the Seventh Circuit, in Linda T. v. Rice Lake Area School District, 417 F.3d 704 (7th Cir. 2005). In Johnson v. Bismark Public School District, supra at 1001, the plaintiff, who was dissatisfied with her son's IEP, hired an attorney, and arranged for a meeting with the defendant school district. Following that meeting, the parties arranged for a second meeting to discuss the student's placement and

program options. Neither the plaintiff, nor her attorney, attended the second meeting but, instead, the plaintiff filed a Due Process Administrative Complaint, which sought the development of an IEP, and prospective compensatory education services for the then upcoming Summer. Id. at 1001-02. Sequently, the parties entered into a Consent Decree, by which the school district agreed to develop a new IEP, and to allow the student's participation in an extended school year for the oncoming Summer.

The plaintiff subsequently filed a Federal action, which sought an award of attorney's fees under the IDEA. The District Court concluded that an award of attorney's fees was improper, and the Court of Appeals for the Eighth Circuit agreed. In so holding, the Court relied upon the evidence that the district had a practice of routinely reviewing all IEP's in the Spring of each school year, and that, since the plaintiff had not requested a special Summer program prior to filing her due process Complaint, she could not assume that an informal request for such services would have been futile. Id. at 1003. The Court further observed, as follows:

> While it would be excessively harsh to hold that [the plaintiff] was not a prevailing party at all, there was little gained by litigation that ended with a promise by the District to provide services that it had not previously refused to provide. Thus, we conclude that this was the kind of "limited success" that justifies a significant reduction in an attorneys' fee award.

Id., citing Hensley v. Eckerhart, supra at 440, and Max M. v. New Trier High School District No. 203, 859 F.2d 1297, 1301-02 (7th Cir. 1988).

Unfortunately for the District's argument, the present circumstance are plainly distinguishable from those present in Johnson. Specifically, unlike Johnson, the Plaintiff obtained relief that the District had previously refused to provide. Most significant was the ALJ's award of 193.5 hours of compensatory education benefits, which substantially exceeded the compensatory services that the District had agreed to provide at all times prior to the ALJ's decision. Furthermore, while the ALJ agreed with the District that, contrary to the Plaintiff's position, M.M. should be placed in a Setting III program, the ALJ ultimately determined that the District's proposed placement was not acceptable under the IDEA, and that the District had violated the IDEA by its failure to provide M.M. with a FAPE during certain specified periods in the 2003-04 and 2004-05 school years.

The District's reliance on the analysis of the Court in Linda T. v. Rice Lake Area School District, supra, is equally misplaced. In Linda T., the Court found that an award of attorney's fees was improper where the ALJ had determined that the defendant school district's placement of a student was proper, but that other portions of the student's IEP were insufficiently particular to satisfy the requirements of the IDEA. Id. at 706-07. In so holding, the Court recognized that, in requiring a more particularized IEP, the ALJ had not required the school district to provide any additional or different services to the

plaintiff. Id. at 708-09. As a result, the Court determined that the degree of success that was obtained by the plaintiff was de minimus, and could not support an award of attorney's fees. Id. at 709.

Here, in contrast to Linda T., the ALJ directed the District to provide additional services to M.M. -- namely, placement at the Barton Open program, and compensatory education services beyond those which the District had previously agreed to provide -- and those services clearly exceeded the de minimus relief that was afforded in both Linda T., and Johnson. Accordingly, after considering each area in which the Plaintiff successfully obtained relief in the administrative proceedings, we find that the Plaintiff was the "prevailing party" for the purposes of Section 1415(i)(3)(B)(i), and that the degree of her success was sufficient to support an award of costs and attorney's fees.

The District also urges that the award of attorney's fees should be reduced given the similarity of the relief that was obtained by the Plaintiff, and the District's Offer of Settlement. See, Title 20 U.S.C. §1415(i)(3)(D)(i)(providing that no award may be made for services performed subsequent to the time of a written offer of settlement, if the offer is timely made, not accepted within ten days, and the relief finally obtained is not more favorable than the offer of settlement); Warner by Warner v. Independent School District No. 625, 134 F.3d 1333, 1338 (8th Cir. 1998)(if relief afforded by Hearing Officer "differed very little from what the School District offered in settlement before the administrative hearing," it is

"highly relevant to the fee award issue."). Here, however, the AU provided M.M. with 193.5 hours of compensatory services, which was substantially more than the 21.5 hours of compensatory education services that were offered in the District's Offer of Settlement.[18] Therefore, we decline to impose any limit on the award of costs and attorney's fees by the District's Offer of Settlement. See, Capistrano Unified School District v. Wartenburg By and Through Wartenburg, 59 F.3d 884, 897 (9th Cir. 1995)(not an abuse of discretion to award attorneys fees where administrative ruling was more favorable than an Offer of Settlement).

Nonetheless, the Plaintiff was not entirely successful at the administrative level. Notably, the ALJ declined to place M.M. in the STRIVE program, which is located outside of the District in Independent School District No. 287, as was advocated by the Plaintiff[19] See, Attachment to Letter of August 24, 2005 from Margaret O'Sullivan Kane to Kathleen Sheehy, at p. 30, Administrative Record, at Inventory Jtem No. 5. In seeking such relief at the administrative level, the Plaintiff maintained that

---

[18] "The District offered 15 hours of compensatory education benefits in addition to the amounts that were offered in the Mediation Agreement. Based on the District's representations, 390 minutes, or 6.5 hours, of compensatory benefits were agreed to in the Mediation Agreement.

[19] The STRIVE program appears to be a Federal Setting IV program. [T. 637]

placement at Barton's Open was improper. See, Id. at p. 17. Similarly, the ALJ declined to accept the Plaintiffs position that the District had denied M.M. a FAPE from May of 2003, until at least August 22, 2005, or grant the Plaintiffs request for a total of 372 hours of compensatory education benefits, which was predicated on the Plaintiff s assertion that M.M. had been in an inappropriate placement since September 13, 2002, and that M.M. had missed 33 days of school during the 2004-05 school year, as well as 121 days of school during the 2003-04 school year. Id. at p. 26

Our review of the Record discloses that a sizable amount of resources were dedicated to advancing such positions as M.M.'s placement in the STRIVE program, as opposed to a Setting III program, and in other respects, which proved ultimately to be unsuccessful. See, Letter of August 8, 2005 from Margaret O'Sullivan Kane to Laura T. Booth, at p. 1, Administrative Record, at Inventory Item No. 16; [T. 613-15, 629-30, 655-59]. Accordingly, some reduction in the Plaintiff's award of fees is warranted. Based upon the present submissions, it is impossible to determine which of the Plaintiff's claimed hours were dedicated to advancing positions that proved to be unsuccessful. Recognizing the absence of any precise formula for determining an appropriate reduction, we recommend that the Plaintiff's award of attorney's fees be reduced by fifteen (15) per cent. We do so on the basis of the Record presented, acknowledging that our assessment is judgmental, based upon a close review of the Record in total, and the applicable precedents, and is not couched in terms of arithmetic precision.

See, e.g., Hensley v. Eckerhart, supra at 436-437 ("There is no precise rule or formula for making these [fee] determinations," but "[a] request for attorney's should not result in a second major litigation.").[20] Simply stated, the Plaintiff should not be rewarded, with attorney's fees, on issues as to which she was not successful at the administrative level.

Counsel for the Plaintiff has provided an itemized listing of her fees and costs that were associated with the prosecution of this action. As is pertinent to our analysis, counsel for the Plaintiff purports to have incurred $35,350.00 in attorney's fees, and $216.20 in costs, in the underlying

---

[20] Considering that our reduction in the award of attorney's fees is based on the Plaintiff's lack of success in several aspects of her case at the administrative level, and is not related to her prosecution of the pending fee Petition, or the defense against the District's appeal, we apply the fifteen (15) percent reduction solely to the fees which are being sought for work performed during the administrative proceeding. The Plaintiff's unsuccessful efforts, during the administrative process, were not advanced in the proceedings before this Court -- at least in the sense of seeking a reversal of the ALJ's rejection of those efforts -- and therefore, it would be inappropriate to reduce the Plaintiff's requested attorney's fees for any of counsel's work as to the District's subsequent appeal, or the Plaintiff's fee Petition.

administrative proceedings.[21] The District has challenged the Plaintiff's entire claim for costs, in the administrative proceedings, which includes $29.00 in witness fees for M.M., and $187.20 in "Courier Service" costs. See, Amended Kane Aff., at Exh. 1. Specifically, the District challenges counsel for the Plaintiff's claim for witness fees for M.M., who did not testify, upon the ground that there is no evidence that either of the two witnesses who were called by the Plaintiff -- Ostrom and L.R. -- actually expended the $29.00 that is being sought, and the claim for courier expenses, on the ground that such expenses are not recoverable under Title 28 U.S.C. §1920.

The Plaintiff has not responded to the District's recommended reductions -reductions which

---

[21] In their Complaint, the Plaintiff seeks an additional $700.00 in expert witness fees for Ostrom's testimony at the Administrative Hearing. Complaint, at ¶15. The District has specifically contested this request, on the ground that an award of expert witness fees, beyond the amount established by Title 28 U.S.C. §§1920(3), and 1821(b). See, Arlington Central School District Board of Education v. Murphy, --U.S. ----, 2006 WL 1725053 at *6 (U.S., June 26, 2006); Neosho R-V School District v. Clark, 315 F.3d 1022, 1031 (8th Cir. 2002). While we agree with the District that an award to the Plaintiff of $700.00 for expert witness fees would be improper, our review of the Plaintiff's itemization fails to disclose any claimed expense for Ostrom's expert testimony. Accordingly, it appears that the Plaintiff has properly abandoned her request to be reimbursed for Ostrom's expert fees.

we find to be warranted. Specifically, considering that M.M. did nottestify, and the absence of any apparent expenses incurred by any of the Plaintiff's other witnesses, it is not possible to determine whether the Plaintiff's request for $29.00 in "witness expense" is reasonable. Moreover, courier expenses are not taxable as "costs," for the purposes of Section 1920, but are instead "out-of-pocket" expenses. See, Martino v. United States, 2002 WL 459469 at *4 (D. Minn., March 20, 2002), citing Hollenbeck v. Falstaff, 605 F. Supp. 421, 439 (D. Mo. 1984), aff'd, 780 F.2d 20 (8th Cir. 1985). Therefore, the Plaintiff is not entitled to any of the $216.20 in costs that she seeks to recover from the administrative proceedings.

The Plaintiff has also identified $421.00 in costs that were associated with the prosecution of her fee Petition. See, Amended Kane Aff., at ¶4. While those costs have not been specifically challenged by the District, it appears that $171.00 of those costs were dedicated to "Courier Service," while the remaining $250.00 was attributable to the payment of the Clerk of Court's filing fee. Id. at Exh. 2. Filing fees paid to the Clerk of Court are taxable as costs. See, Title 28 U.S.C. §1920(1). However, since the expenses associated with courier service are not taxable, we find that the Plaintiff's total recoverable costs are $250.00.

Additionally, the District has specifically challenged the propriety of an award of attorney's fees for the 1.75 hours that were expended by counsel for the Plaintiff in relation to an IEP meeting that was conducted on August 5, 2005. Specifically, the

District notes that, under Title 20 U.S.C. §1415(i)(3)(D)(ii), "[a]ttorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section." The provision "prohibits recovery of fees associated with IEP meetings unless the meeting is convened by order of a court or administrative agency." Linda T. v. Rice Lake Area School District, supra at 709.

The District contends that any fees associated with the IEP meeting of August 5, 2005, are not recoverable, as the meeting was not conducted pursuant to the request of the ALJ, but was a result of L.R.'s request for an IEE. The Plaintiff has not responded to the District's argument, nor is it apparent from the Record that the IEP meeting was conducted pursuant to an Order of the ALJ. Therefore, we find that a reduction of the Plaintiff's claimed attorney time, by 1.75 hours, is proper.

As noted, the Plaintiff requested award of attorney's fees was calculated based on counsel for the Plaintiffs asserted rate of $250.00 per hour. Fee calculations, under the IDEA, "shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished," Title 20 U.S.C. §1415(i)(3)(C), and the Court may reduce an award of attorney's fees, where the rate "unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill,

reputation, and experience." Title 20 U.S.C. §1415(i)(3)(F)(ii).

In support of her assertion, that her rate of $250.00 per hour is reasonable, the Plaintiff has submitted the Affidavits of Tammy L. Pust ("Pust"), and Amy J. Goetz - 70 ("Goetz"), who are both attorneys who practice in the area of special education law. See, Affidavit of Tammy L. Pust ("Pust Aff."), at ¶2; Affidavit of Amy J. Goetz ("Goetz Aff."), at ¶2. According to each of those Affidavits, as well as the Affidavit of counsel for the Plaintiff, special education law is a highly specialized area of practice that requires knowledge of a complicated convergence of State, Federal, and Administrative law. See, Pust Aff., at ¶3; Goetz Aff., at ¶3; Kane Aff. at ¶6. Goetz further avers that her average hourly rate for representation in special education cases is $250.00 per hour, and that the plaintiffs' bar, in special education cases, bills at a rate of between $200.00 and $250.00 per hour. Goetz Aff., at ¶4. Pust avers that her average hourly rate for special education cases is $200.00 per hour. Pust Aff., at ¶4.

The District does not appear to challenge the $250.00 per hour rate that counsel for the Plaintiff is requesting. However, under substantially similar circumstances, a Court within this District recently determined that counsel for the Plaintiff's hourly rate of $250.00 "unreasonably exceed[s] the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience." See, J.T. v. Independent School District No. 701, Civ. No. 05-1640, at p. 7 (D. Minn.,

April 17, 2006)("J.T. II"), citing Title 20 U.S.C. §1415(i)(3)(F)(ii). There, the Court was presented with substantially the same averments of Goetz and Pust, and determined that the reasonable rate for counsel for the Plaintiff's services, in a special education case, was $220.00 per hour. Counsel for the Plaintiff has not presented any circumstances that would distinguish this case from J.T. II, for the purposes of determining an appropriate hourly rate under Section 1415(i)(3)(C). Therefore, guided by the Court's determination in J.T. II, we find that the $220.00 is a reasonable hourly rate for the services rendered by counsel for the Plaintiff.

Counsel for the Plaintiff has averred that she bills paralegal services at a rate of $75.00 per hour, and law clerk services at a rate of $100.00 per hour. An award of attorney's fees may include work performed by paralegals or law clerks. See, Missouri v. Jenkins, 491 U.S. 274, 286 (1989); see, e.g., Blackman v. District of Columbia, 397 F. Supp.2d 12, 17 (D. D.C. 2005). While no Affidavits or other evidence was offered as to the reasonableness of such rates, our experience suggests that such rates are, in fact, reasonable. Accordingly, in the absence of any objection from the District, our recommended award of fees will include paralegal services at a rate of $75.00 per hour, and law clerk services at a rate of $100.00 per hour.

Applying the identified reductions, we recommend that the Plaintiff be awarded costs and attorney's fees in the total amount of $36,517.88. In arriving at this figure, we have calculated the

Plaintiffs entitlement to fees from the prosecution of the administrative proceeding, separately from those costs and fees which were incurred in the prosecution of the Plaintiff's fee Petition, and in defense of the District's appeal. In calculating the appropriate award of fees for the Plaintiffs prosecution of the administrative proceeding, we have subtracted the 1.75 hours that were expended in relation to the IEP meeting of August 5, 2005, from the 137.25 hours that were expended by counsel for the Plaintiff, for a total of 135.5 hours. We then multiplied the 135.5 hours expended by counsel for the Plaintiff in the prosecution of the administrative proceedings by the reasonable rate of $220.00, for a total of $29,810.00.

To this amount, we have added the fees resulting from work performed by the support staff of counsel for the Plaintiff Specifically, we have multiplied the 8.5 hours of paralegal services rendered during the representation at the administrative proceedings by the rate of $75.00, for a total of $637.50. We have also multiplied the rate of $100.00 per hour by the 4 hours that were expended by a law clerk in the underlying administrative proceedings, for a total of $400.00. Adding each of these figures together, we determined that the Plaintiff incurred attorney's fees in the amount of $30,847.50, in the prosecution of the administrative proceeding. After reducing this figure by fifteen (15) per cent -- in order to account for the unsuccessful claims -- we find that the Plaintiff is entitled to reasonable attorney's fees in the amount of $26,220.38, for the prosecution of the administrative proceedings.

Using a similar method of calculation, we find that the Plaintiff is entitled to an award of $10,047.50 in attorney's fees for the prosecution of the fee Petition, and the defense of the District's appeal. In arriving at this figure, we have multiplied the 45.5 hours that were expended by counsel for the Plaintiff in her prosecution of the pending fee Petition, and in defense of the District's appeal, by the reasonable rate of $220.00, for a total of $10,010.00.[22] To this figure, we have added $37.50, which represents the fees incurred for the .5 hours of paralegal services that were incurred by the Plaintiff, at a rate of $75.00 per hour.

Adding the award of $26,220.38 in attorney's fees for the prosecution of the administrative proceeding, with the award of $10,047.50 in attorney's fees for the prosecution of the fee Petition, and defense of the District's appeal, we find that the Plaintiff is entitled to a total award of fees in the amount of $36,267.88. The Plaintiff is also entitled to $250.00 in costs, for a total award of $36,517.88 in costs and attorney's fees. We expressly find that such an award of fees and costs is reasonable under governing precedents of law.

The Plaintiff has also requested pre judgment

---

[22] Again, see footnote 16, supra, while the Plaintiff's counsel has averred to expending 47.5 hours in her prosecution of the fee Petition, and in defense of the District's appeal, see, Amended Kane Aff., at ¶4, the invoices that were presented in support of the Motion only account for 45.5 hours. See, Id., at Exh. 2.

and post-judgment interest in the amount of six (6) per cent. An award of interest in Federal civil actions is ordinarily governed by Title 28 U.S.C. §1961(a), which provides as follows:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding. [sic] the date of the judgment.

As such, "[p]ost-judgment interest is appropriate when a district court enters judgment awarding reasonable attorney's fees under the IDEA." Kaseman v. District of Columbia, 329 F. Supp.2d 20, 28 (D. D.C. 2004); see, e.g., J.T. II, supra at p. 12; Blackman v. District of Columbia, 390 F. Supp.2d 16, 20 (D. D.C. 2005).

"The award of prejudgment interest is generally entrusted to the district court's discretion." EFCO Corp. v. Symons Corp., 219 F.3d 734, 742 (8th Cir. 2000). Exercising that discretion, the Court, in J.T. II, supra at p. 12, recently denied a similar request for pre judgment interest, while other Courts have awarded prejudgment interest in special

education cases. See, Kaseman v. District of Columbia, supra at 28; Halbrook v. District of Columbia, 305 F. Supp.2d 41, 48 (D. D.C. 2004).

In both Kaseman and Halbrook, the Court awarded pre judgment interest after considering the viability of the defendants' opposition to the fee Petition; the conduct of the defendants, and any resulting delay that has resulted in payment for legal services; and whether the defendants had engaged in "unreasonable penny-pinching scrutiny," which they found "produces serious chilling effects on the availability of competent, experienced attorneys to serve" IDEA . See, Halbrook v. District of Columbia, supra at 47-48; Kaseman v. District of Columbia, supra at 28-29. The determination that pre judgment interest was proper, in those cases, was predicated upon findings that the arguments of the defendants either "bordered on the absurd" or were "frivolous"; that the defendant's had completely "stonewalled" the plaintiff's requests for payment; and that the defendants had engaged in "unreasonable penny-pinching scrutiny," in addressing the plaintiff's requests for fees. Id.

The circumstances here are materially distinguishable from those present in both Halbrook and Kaseman. Notably, the District's failure to settle the Plaintiff's request for attorney's fees appears to be a product of its good-faith appeal of the ALJ's Order, as well as its belief that the ALJ's placement of M.M. in a Setting III program rendered any award of attorney's fees improper. While our Recommendation, if adopted, would render the

District's appeal largely unsuccessful, and would require an award of attorney's fees, the District's arguments were neither "frivolous" nor "absurd," but instead, were reasonably based in law and fact and involved contested issues which have a reasonable basis in fact and law. As such, the District cannot be said to have stonewalled the Plaintiff's entitlement to costs and attorney's fees. Moreover, at least some of the District's positions were meritorious, and have resulted in a Recommendation that the Plaintiff's requested award of costs and attorney's fees be reduced appreciably.

Of course, we recognize the importance of awarding attorney's fees in ensuring the enforcement of the IDEA, and accept that delays in the payment of attorney's fees may "discourage lawyers who do such important work by failing to pay them for their services in a timely fashion." Id. at 48. Nevertheless, considering the reasonable basis for the District's opposition to the Plaintiff's requested fee award, as well as the meritorious nature of some of the District's legal arguments, we find that a balancing of the equities does not support an award of pre-judgment interest. Therefore, we recommend that the Plaintiff's Motion for an Attorney's Fees and Costs be granted, in part, such that the Plaintiff should be awarded a sum of $36,517.88 in costs and attorneys fees, plus post-judgment interest calculated in the manner provided for under Title 28 U.S.C. §1961.

NOW, THEREFORE, It is –
RECOMMENDED:

1. That the School District's Motion for Summary Judgment [Docket No. 7] be granted, in part, and denied, in part, as further discussed in the text of this Order.

2. That the Plaintiff's Motion for Costs and Attorney's Fees [Docket No. 23] be granted, in part, as further discussed in the text of this Order.

3. That the Plaintiff be awarded $36,517.88 in costs and attorney's fees, plus post-judgment, calculated in the manner provided under Title 28 U.S.C. §1961.

Dated: July 18, 2006 /s/ Raymond L. Erickson
Raymond L. Erickson
CHIEF U.S. MAGISTRATE JUDGE

NOTICE

Pursuant to Rule 6(a), Federal Rules of Civil Procedure, D. Minn. LR1.1(f), and D. Mum. LR72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties **by no later than August 4, 2006**, a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a

review of a transcript of a Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing **by no later than August 4, 2006**, unless all interested parties stipulate that the District Court is not required by Title 28 U.S.C. §636 to review the transcript in order to resolve all of the objections made.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF EDUCATION

In the Matter of [Student] and the Minneapolis Public Schools, Special School District No. 1.

FINDINGS OF FACT CONCLUSIONS AND DESIGN

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy, serving as independent hearing officer pursuant to Minnn. Stat. § 125A.091. The hearing took place on August 9, 11, and 12 at 807 NE Broadway Street, Minneapolis, Minnesota. The record closed on August 24, 2005, upon receipt of the parties' post-hearing briefs.

Margaret O'Sullivan Kane, Esq., Center for Education Law, Ltd., 1654 Grand Avenue, Suite 200, St. Paul, MN 55105, appeared for the student.

Laura Tubbs Booth, Esq., Booth Law, 1820 N. Xenium Lane, Plymouth, MN 55441, appeared for the school district.

NOTICE

This Order is the final decision in this case. Any person aggrieved by this decision may seek judicial review pursuant to 34 C.F.R. § 300.512(a)

and Minn. Stat. § 125A.091, subd. 24. Any appeal to the Minnesota Court of Appeals must be by a writ of certiorari in accordance with Minn. Stat. §§ 14.63-.69, except that the appeal period will expire 60 days after receipt of this Order.

STATEMENT OF ISSUES

This case presents the following issues:

(a) Did the district unilaterally change the student's placement through a series of suspensions and expulsions, in violation of 20 U.S.C. § 1415(j) & (k), and 34 C.F.R. § 300.519?

(b) Did the district fail to identify and evaluate the student's needs for special education, in violation of 20 U.S.C. §§ 1412(a)(3) & (7), and 1414(a)(2)(b) & (c)?

(c) Did the district fail to develop, review, and revise the student's education program to meet her needs, in violation of 20 U.S.C. §§ 1412(a)(4), 1414(d)(1)(A), and 1414(d)(4)?

(d) Did the district fail to consider input from the parents in evaluating the student, in violation of 20 U.S.C. § 1414(b)?

(e) Did the district fail to obtain informed parental consent before reevaluating the student, in violation of 20 U.S.C. § 1414(c)(3)?

(f) Did the district fail to ensure that the

parent received written prior notice, in violation of 20 U.S.C. 1415(b)(3)?

(g) Did the district fail to have an IEP in effect at the beginning of each school year, in violation of 20 U.S.C. § 1414(d)(2)?

(h) Did the district fail to provide the student with necessary supplementary aids and services in the least restrictive environment, in violation of 20 U.S.C. § 1412(a)(5)?

(i) Did the district fail to educate the student in an atmosphere conducive to learning, as required by Minn. R. 3525.1400?

(j) Did the district deny the student a free appropriate public education, in violation of 20 U.S.C. 1412(a)(1)?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background Facts

1. The student is a 14-year-old resident of the Minneapolis school district. She has attended school in the district for all but approximately three weeks of her education, from September 7 to September 27, 2004, when she was briefly enrolled in a charter school. She attended Jordan Park Elementary through the fourth grade, where she was evaluated

and deemed eligible for special education services under criteria for Students Needing Alternative Programming (SNAP). She moved to Jenny Lind for the fifth grade.[1] The student lived with her grandmother, who was her guardian, from 1996 to approximately February 2003 while her mother served a term in prison.[2] From that point forward the student lived with her mother, her grandmother, or with both her mother and grandmother at her grandmother's home.

2. The student's serious trouble in school commenced in the sixth grade at Franklin Middle School. On April 24, 2003, teachers discovered that she had brought a four-inch serrated steak knife to school. The student claimed she needed it to protect herself, because two other students had threatened her. School administrators suspended her from school that day for being in possession of a dangerous weapon. Her IEP team determined that the weapons offense was not a manifestation of her disability.[3] School staff recommended expulsion and/or an

---

[1] D 707; D 313. SNAP is a special eligibility designation provided to students in Minneapolis who demonstrate low achievement but do not qualify for special education under criteria developed for specific learning disabilities (SLD). The Department of Education has authorized the Minneapolis Public Schools to use this designation in order to provide special education services to these students. Tr. 1:58-59.

[2] D 321.

[3] D 651

administrative transfer if she were not expelled.[4] At the expulsion meeting on May 12, 2003, the grandparent agreed that the student would be reinstated but would not return to school, instead receiving homebound instruction through the end of the year, and she further agreed that the student would be transferred to another school in the fall.[5]

3. This decision was the first of several transfers, described in more detail in the Findings that follow, which took place within the Minneapolis Public School district in response to serious behavioral incidents by the student.

4. The issue that ultimately led to this hearing arose in January 2005, when the student was attending Olson Middle School. Her IEP team, in response to a serious assault on another student, recommended that the student's placement be changed to a federal Setting III/ SPAN program, which would be more structured and have smaller classes, a higher teacher to student ratio, and close monitoring of behaviors. SPAN programs are self-contained classrooms within a mainstream school building; they are structured to allow students to participate in mainstream activities as they demonstrate more behavioral control in the self-contained classroom. The parent did not agree to this recommended change of placement and insisted that the student remain in a mainstream setting. After a series of additional suspensions, which totaled

---

[4] D 654.

[5] D 652.

approximately 38 days in the 2004-05 school year, and another transfer (to the W. Harry A. Davis Academy) in April 2005, the parent requested a due process hearing.

5. In the course of the due process proceeding, the district agreed to an independent educational evaluation (IEE) by a pediatric neuropsychologist and to an independent functional behavior assessment (FBA) by a behavior specialist. Both evaluators concluded that a more restrictive setting was necessary for this student. An IEP meeting was held immediately before the hearing, on August 5, 2005, to review the evaluations and attempt to reach agreement on the provisions of the IEP and the placement for the fall. The district invited a representative of Intermediate District 287 to the IEP meeting, with the expectation that District 287 might have some alternative programs available. As it turned out, District 287 has no Setting III programs, but the representative described a Setting IV program that is intended to serve students who are developmentally or cognitively delayed (DCD) in addition to being qualified under EBD criteria.[6] The IEP team reached no agreement on the program or placement during this meeting.

6. At the hearing, the parent maintained that the student should be placed in District 287's Setting IV program. The district defended its proposed IEP dated March 9, 2004, which recommended a Setting

---

[6] D 733.

III placement at the Jordan Park SPAN program.[7]

Lucy Laney School-2003-04

7. In the fall of 2003, the student was transferred to Lucy Laney Community School. At the parent's request, the district re-evaluated the student to see whether a different placement would be more appropriate. In addition, the district needed to know if the student's instructional program was effective and what changes were needed to improve educational outcomes. When the evaluation was completed, the district determined that the student now qualified for special education in the primary eligibility category of emotional/behavioral disorder (EBD), with secondary eligibility in SNAP and speech or language impairments.[8]

8. An IEP dated November 19, 2003, was developed in response to this evaluation. The IEP had goals for reading, math, speech, and behavior. The present levels of performance for reading indicated that the student was performing at the 17th percentile in reading and the 1St percentile in math on curriculum-based measures of performance. With regard to behavior, the student was talking out in classes every five to ten minutes, kicking, hitting, or shoving eight or more times each school day, sleeping and refusing to work three to five days per week, and

---

[7] The district filed a proposed IEP with the Administrative Law Judge after the hearing, but it is not part of the evidentiary record in this case.

[8] D 312-20

completing about 30% of her assignments. Goals and objectives were set based on improving these levels of performance. Adaptations included preferential seating, modified reading assignments, directions broken down in steps, use of manipulatives, modified grading if needed, and use of a daily planner for homework. The IEP stated that the student was able to follow district discipline policies. It also provided that the parent was to receive written progress reports four times per year.[9]

9. A Behavior Intervention Plan (BIP) was also developed in connection with the evaluation. The intervention plan involved use of a daily point sheet; a check-in with the special education teacher at the beginning and end of each day; use of tangible and intangible reinforcers; and limitation on passes in the classroom, because the student needed close staff supervision throughout school day, especially during transitions. The student would receive two warnings for misbehavior, which teachers would redirect or ignore when possible. The next step was a behavior referral and loss of the opportunity to gain reinforcers for that day. If the student escalated further, her mother would be called and would impose a consequence at home. Small group sessions after school were scheduled to increase appropriate behavior and work completion.[10]

10. On February 13, 2004, the student was involved in a fight with another student. When a staff

---

[9] D 297

[10] D 323.

member attempted to break up the fight, the student kicked him and punched him in the face.[11] The student was suspended for several days.[12]

11. On February 19, 2004, the district sent the parent a Notice of Team Meeting to take place on February 24, 2004, for the purpose of making a manifestation determination regarding this incident.[13] At the meeting, the team determined that because the student's placement was not appropriate, the behavior had to be determined to be a manifestation of her disability. The team recommended that the suspension be extended to a total of ten days and that the student be moved to another school.[14] There is nothing in the record to explain why the team reached the conclusion that the setting was inappropriate or why a transfer to another school was thought to be consistent with the student's needs. Neither the student's IEP nor her BIP were reviewed or revised at this time. An administrative transfer to Olson Middle School was

---

[11] D 666.

[12] The district's discipline records regarding suspensions for the 2003-04 school year are incomplete. There is no record similar to Student's Ex. 211 (suspensions for part of 2004-05) or Student's Ex. 212 (suspensions 2001 through May 2003). Other records reflect, however, that as of March 4, 2004, the student had been suspended twice during the current school year. See D 666.

[13] D 293.

[14] D 291.

approved effective March 4, 2004.[15]

12. There is no evidence that any written IEP progress reports were provided to the parent while the student attended Lucy Laney.

13. Although it cannot be determined with any certainty on this record how many total days the student was suspended while she attended school there, it appears likely that she had been suspended for at least ten days before the incident on February 13, 2004, because at that time the district held an IEP meeting to make a manifestation determination. Other records suggest it is the district's policy to hold such meetings concerning disabled students when the total number of suspension days in a school year exceeds ten.[16]

Olson Middle School-2003-04

14. The student finished the school year at Olson Middle School. During this time she behaved appropriately with teachers but had issues with being sexually inappropriate with males and conflicts with female students.[17]

15. As noted above, there are no records of the number of days the student was suspended between March and June 2004. A progress report dated June 1, 2004, reflects that the student had made adequate

---

[15] D 666.
[16] D 227.
[17] D 50.

progress in reading, improving her results on curriculum-based measures to the 21st percentile; and adequate progress in math. With regard to her behavior goal, the student had made insufficient progress and she engaged in targeted misbehaviors at the same rate. The report further provides that the student's absences due to suspensions were interfering with her learning.[18]

16. It is a fair inference from the record that the student had more than ten days of suspension in the 2003-04 school year, and that the suspensions were numerous enough to impact her education.

2004-05 School Year

17. The student started the 2004-05 school year at the Charles Young Military Academy, a placement selected by the parent because she wanted the student to have more supervision. She withdrew the student after three weeks and re-enrolled her at Olson Middle School because she did not like the program at the military academy and because the Department of Education was closing it.[19] When the student returned to Olson, the parent requested that she repeat the seventh grade. The district agreed to this request.[20]

18. Immediately upon her return to Olson, her IEP team met to discuss increasing her service

---

[18] D 306.

[19] Tr. 2:306, 311.

[20] D 50.

minutes in special education and to clarify what behaviors would cause the school to recommend a more restrictive SPAN placement.[21]

19. The district proposed an IEP revision on October 7, 2004, which increased the amount of time the student spent in special education. The rninutes of service for reading, writing, and behavior goals were increased. The IEP called for 30 minutes of speech service twice a week; 50 minutes of math five times weekly; 35 minutes of reading five times weekly; 15 minutes of writing five times weekly; and 30 minutes of behavior management five times weekly. The change form was was sent to the parent with a Notice of Proposed Action; the parent did not consent or object to the IEP, and it became effective October 21, 2004.[22]

20. On October 11, 2004, the district sent the parent a Notice of Team Meeting on October 18, 2004, for the purpose of reviewing the IEP and development of a transition plan for the student.[23] The parent did not attend the meeting, but the student did. The proposed IEP developed at the meeting contained present levels of performance in reading, math, and writing. The student was reading at the 37th percentile and had math skills at the 25th percentile. She could write in complete sentences but needed to work on writing paragraphs and adding

---

[21] D 50.

[22] D 277.

[23] D 275.

detail to her writing. With regard to behavior, the IEP provides that she has had difficulty interacting appropriately with peers and working in groups without engaging in negative dialogue. The IEP contains goals for reading, math, writing, and speech; it contains several behavioral goals for improving positive social interactions, improving her organizational skills through use of a planner, and increasing work completion. Adaptations include extended time to complete assignments and use of a behavior monitoring sheet. It further provides that the student will follow the Minneapolis Public Schools behavior policy. The service minutes were the same as those proposed on October 7, 2004.[24] It is not clear whether this IEP was sent to the parent or whether it ever became effective.

21. On October 18, 2004, the IEP team also determined that another FBA should be performed, as requested by both district officials and the parent, along with a transition assessment. A Notice of Educational Evaluation/Re-Evaluation was sent home with the student. The parent did not consent or object to the notice.[25] The district started the FBA and transition evaluation on November 1, 2004.[26]

22. On October 18, 2004, the student received one day of in-school suspension for conduct that is not described in the suspension notice.[27]

---

[24] D 241.
[25] D 247.
[26] D 295.
[27] Student's Ex. 199, page 520.

23. On October 26, 2004, the student was suspended for three days for lack of cooperation and being disrespectful in the time-out room.[28]

24. On November 19, 2004, the student was suspended for either three[29] or five days[30] for fighting.

25. On November 22, 2004, the team developed an IEP that is quite similar to that dated October 18, 2004, except that it reduces the number of speech minutes to 15 minutes twice weekly. This IEP provides that the student would now be spending 2160% of her time in a special education resource room as the least restrictive alternative (LRE). There is no notice of a team meeting associated with this IEP, but the IEP indicates that the parent attended a meeting on that date. The parent did not consent or object to this IEP, and it apparently became effective after 14 days. The district's copy of this IEP has a hand-written notation that it is the "stay put" IEP.[31]

26. The transition evaluation was completed November 30, 2004. It notes that the student was taking Adderal once a day for behavior.[32]

27. The only progress reports for the 2004-05 year reflect slight progress in December 2004 on the

---

[28] Student's Ex. 199, page 521-22.

[29] Student's Ex. 211.

[30] D 708-09. See also Student's Ex. 199, page 523.

[31] D 133.

[32] D 233.

reading goal, slight progress on the math goal, and moderate progress in writing. There is no assessment of progress with regard to the behavior goals; the report says simply the student is "working on" the goals and objectives.[33] In November 2004, the student was making adequate progress on her speech goals.[34]

28. A BIP completed on December 10, 2004, identifies the student's target behaviors as coming to class on time and remaining in the room, following directions, respecting peers and adults, bringing materials and finishing work, and not fighting. The student was receiving poor grades in all classes because she did not regularly turn in her work. She was walking out of one class per day to see what was going on in the hallways. She was noncompliant with adults at least three times a week and verbally disrespectful at least three times a week. The plan called for adapting reading and writing assignments to her instructional level; pairing her with a partner; providing extended time to meet deadlines; and sitting in an area where she would not be distracted by other peers or noise in hallway. It further provides that the student will receive daily direct instruction in appropriate interaction choices with peers and adults, from various adults in the building, and that she will be reminded to check with teachers on missing work and asked each morning by the case

---

[33] D 249.

[34] D 238. These progress reports are not addressed to the parent and it is likely that they were not provided to the parent until after the mediation on March 28, 2005. See Tr. 1:124; D 1.

manager if she has work to turn in. In addition, the student will carry a point sheet each day, to be presented to her teacher every hour to indicate her hourly performance. This sheet was to go home to her parent each day. The plan also provides that the student will be given feedback and praise each hour based on performance. The plan provides for the following sequence of interventions: verbal redirection and proximity of teacher; sit in time-out area; remove from classroom and go to administration; administration will decide appropriate consequence depending on circumstances (in-school suspension, out of school suspension, or immediate removal from class or school area if she becomes physically aggressive). The plan provides that the student is not exempt from MPS discipline policy and that consequences for behavior will be given accordingly.[35]

29. On December 14, 2005, the student was suspended for two days for disruptive behavior.[36]

30. The FBA completed on or about this time concludes that the student had 12 days of out-of-school suspensions and one in-school suspension on record, and that an FBA was required when there are more than ten days of suspension on record. It noted that the student's behaviors and concerns for the safety of students and staff had increased since the fall. It identifies multiple incidents of verbal and physical inappropriateness and/or aggression in

---

[35] D 231.

[36] Student's Ex. 211; D 708-09.

which the student has threatened the safety of others and disregarded classroom and school rules. Her teachers reported that she appeared to be a student with low ability, is underachieving in all her classes, and seems unmotivated to work or listen to instructions in class. Her negative behaviors occur consistently throughout the day. She was defiant and argued with staff and administrators when instructed to adjust her behavior and has not been responsive to most of the interventions attempted. The FBA recommended more intensive behavior support in a smaller, structured classroom environment; working with her to make positive choices; an opportunity to check in with an adult throughout the day; providing clear expectations of behavior and academic requirements; positive reinforcement; and a class in social skills.[37]

31. On January 4, 2005, the student was suspended for five days for getting into a verbal disagreement with a physically handicapped student who uses a walker/wheelchair and then striking her in the face.[38]

32. At the manifestation determination meeting on January 5, 2005, the team agreed that the student's placement was not appropriate and that her behavior accordingly was a manifestation of her disability. The parent attended the meeting, at which district staff recommended that the student be placed

---

[37] D 227-30.

[38] D 225; Student's Ex. 199, page 525; Student's Ex. 211.

in a Setting III SPAN program. The parent initially agreed that a SPAN program would be the best placement and that the student would receive homebound instruction until that placement was achieved.[39] The student's social worker completed the paperwork required to request a SPAN placement.[40]

33. After this date, the district informed the parent that the student would receive five hours per week of homebound instruction while awaiting a SPAN placement, which the parent believed was insufficient.[41] Because of this dispute, no homebound instruction was provided to the student, although the social worker did bring homework to the student's home for her to complete there.[42]

34. There are indications in the record that school administrators initially recommended expulsion of the student based on this incident, but were advised they could not proceed based on the IEP team's determination that the conduct was a manifestation of the student's disability.[43]

35. On January 18, 2005, the parent, the social worker, and the student met with a social worker at the SPAN program for rniddle school students at Jordan Park Community School[44] At this

---

[39] D 224-25; D215.
[40] D 215.
[41] D 199.
[42] Tr. 1:127; D 197.
[43] Tr. 2:344-50; Testimony of Bill Smart.
[44] D 194.

meeting the district proposed an IEP calling for placement in a Setting III program, specifically requiring the student to be subject to the city-wide discipline policy, Jordan Park Expectations, and Jordan Park SPAN expectations. The IEP further provided that, although the student would be subject to the city-wide discipline policy, the length of suspensions could be modified. The service minutes were described as 360 behavior minutes per day, with speech services for 15 minutes twice weekly.[45] Because of the high ratio of male to female students, and the student's history of being sexually inappropriate with boys, the parent did not believe the Jordan Park Span program was appropriate.

36. At this meeting, the parent learned that the district had another SPAN program for middle school girls at Barton Open School, which the parent wanted to see.[46] The social worker attempted to set up an informational meeting there, but the district refused to do so because there were no openings at Barton.[47] The social worker told the parent to bring the student back to school if there was no agreement reached on homebound instruction.[48] The student returned to school on or about January 19, 2005.[49]

37. On January 21, 2005, the student was

---

[45] D 176.
[46] D 194.
[47] Tr. 1:95, 98.
[48] Tr. 2:350.
[49] Id.

suspended for three days for fighting.[50] The IEP team determined the conduct was a manifestation of her disability.[51] At the same meeting, the IEP team agreed that the Jordan Park SPAN program was not an appropriate placement. The social worker's notes indicate that homebound services for this suspension would start as soon as a teacher was located.[52] It is not clear whether homebound services were provided during this suspension.

38. On February 1, 2005, the student was suspended for four days for having a can of mace at school, refusing to turn it over to district staff, and assaulting the administrator who tried to take it from her.[53] The IEP team determined that the behavior was a manifestation of her disability and that the current placement and behavior management strategies were not appropriate.[54]

39. On February 15, 2005, the student was suspended for four days for assaulting a student in the classroom.[55] Although a Notice of a Team Meeting to take place on February 22, 2005, for the purpose of making a manifestation determination was sent to the parent, there is no manifestation determination in the record regarding this incident.

---

[50] Student's Ex. 211.

[51] D 193.

[52] D 193.

[53] Student's Ex. 2199, page 527; Student's Ex. 211.

[54] D 183-84.

[55] Student's Ex. 199, page 528; Student's Ex. 211.

40. On February 16, 2005, the district sent the parent a Notice of District's Proposed Action seeking her permission to implement the IEP dated January 18, 2005, which again called for placement at the Jordan Park SPAN program. The Notice provided that the district would not proceed without the parent's written consent. The parent refused to consent to this IEP.[56]

41. On February 28, 2005, the student was suspended for three days for disruptive behavior.[57] There is no record that a manifestation determination was made regarding this incident.

42. On March 3, 2005, the district sent the parent a Notice of Team Meeting to review the IEP and discuss placement options.[58] On the same day, the parent was in the building and witnessed an argument between the student and a boy in her class. She commented to the social worker, who was in the hallway because of the noise involved in the incident, something to the effect of "if he put his hands on my daughter you'll need to worry about me, you'll need to send me back to prison." She also said "if he put his hands on my daughter I will slap him." As a result of these comments the district issued a trespass notice to the parent, prohibiting her from entering the school. The parent did not receive the notice and continued to come to school approximately twice a

---

[56] D 173-74.

[57] Student's Ex. 199, Student's Ex. 211.

[58] D165.

week, as she had done before.[59]

43. On March 7, 2005, the student was suspended from school for three days for threatening to throw a chair at another student.[60] The IEP team determined that this behavior was a manifestation of the student's disability.[61]

44. The parent did not attend the IEP meeting on March 9, 2005. At that time the district proposed an IEP calling for placement in a Setting III SPAN program. As with the proposed IEP dated January 18, 2005, and February 16, 2005, the Adaptations section requires the student to conform to the city-wide discipline policy, Jordan Park Expectations, and Jordan Park SPAN expectations. The service minutes are identified as 360 behavior minutes per day. The present levels of performance are the same as those identified in November 2004. The proposed IEP was sent to the parent with a Notice of proposed Action indicating that the district would proceed with the change unless the parent objected in writing within 14 calendar days.

45. On March 17, 2005, the student was suspended from school for three days for fighting.[62] The IEP team determined that this behavior was a manifestation of the student's disability.[63]

---

[59] D 115; Tr. 2:292.
[60] Student's Ex. 199; Student's Ex. 211.
[61] D 160.
[62] Student's Ex. 199, page 531; Student's Ex. 211.
[63] D 147

46. At about this time the parent requested mediation with the school district. The mediation took place on March 28, 2005. During the mediation the district indicated that it would try to get the student into the SPAN program at Barton Open. The parent wanted the student out of Olson Middle School.[64] The agreement reached during the mediation provides as follows:

(1) Regarding placement: parent will visit Barton & update Don Allen by 4/1/05; parent will register [the student] for Harry Davis school; Olson (Bill Smart) [the social worker] will set up a transition IEP meeting with Harry Davis prior to 4/18/05; (2) Bill Smart will notify prior to 4/1/05 [the student's] bus driver that she sits in front; (3) the IEP team will address the transition and modifications to the IEP in the following areas: behavior goals, adaptations, Behavior Intervention Plan, and will determine compensatory education; (4) Barbara Muir will follow up with Kim Mesun prior to 4/15/05 regarding compensatory education; (5) Bill Smart will check on the implementation of progress reporting and report to parent by 4/1/05; (6) Barbara Muir will discuss confidentiality with the administrative team prior to 4/1/05; (7) Barbara Muir will send a memo to teachers prior to [date unclear] indicating that [the student] has permission to see Dr. Muir or Mr. Smart when she is feeling frustrated & has verbalized the need to her teacher.[65]

47. It is not clear whether there was ever an opening at the Barton SPAN program or whether

---

[64] Tr. 2:337, 342.

[65] D 5-6.

such a placement was offered to the parent before the hearing. The compensatory education minutes were intended to make up for behavioral services that were not provided after the student's special education teacher went on maternity leave in December 2004.[66] The district later calculated the compensatory education minutes as 15 minutes of services times 26 days, or a total of 390 minutes of service.[67] The social worker from Olson Middle School agreed to provide this service to the student in 45-minute sessions at W. Harry A. Davis Academy, after school, on Tuesdays and Thursdays.[68]

48. After the mediation, the parent visited the Barton Open SPAN program by herself. Based on her conversation with a teacher there, the parent concluded the Barton program focused on behavior primarily as opposed to academics, and the parent concluded the program would not be appropriate.[69]

49. The student was enrolled in the W. Harry A. Davis Academy, another Minneapolis Public School, on April 11, 2005.[70] An IEP meeting was held that day to discuss the transition, determine how the IEP would have to be changed, and schedule an updated FBA to take place on April 28, 2005.[71]

50. The social worker met with the student on April 12, 2005, and April 14, 2005, to provide the

---

[66] Tr. 1:107; D 1.
[67] D 1.
[68] D 2-4.
[69] Tr. 2:338.
[70] D 707.
[71] D 144.

compensatory behavior services. He met with her for a total of 60 minutes on these two days.[72]

51. On April 15, 2005, the student was involved in a fight with other students that began in the school parking lot after a talent show. Student witnesses reported that a woman described as the student's mother pulled up in a car and asked what was going on, then advised all the students to go to a vacant lot across the street if they wanted to fight. At that point the woman gave the student mace, and the student used it on one of the others, then pulled the girl's hair, punched her in the face, and pushed her onto the ground. Friends of the other students broke up the fight.[73]

52. On April 18, 2005, the student was suspended from school for five days for her conduct in this incident. School administrators did not interview the student or her mother about this incident. In fact, the parent was not present during the incident. The woman who provided the mace to the student and encouraged the fight was the parent's sister.[74] On April 25, 2005, the IEP team determined that this

---

[72] D 1-4. On this day, the social worker at Olson sent a fax to the social worker at W. Harry A. Davis. On the fax cover sheet, someone wrote the words "Fat Bitch." The social worker at Olson did not write these words on the fax cover sheet, and there is no evidence that anyone else associated with the district did either. Tr. 1:133-38.

[73] D 7-14.

[74] Tr. 2: 436.

behavior was a manifestation of the student's disability.[75] At this meeting the parent denied that she was involved in the incident, but there was little discussion otherwise about the underlying facts. The district proposed an interim IEP calling for homebound instruction for the duration of the school year, which the parent agreed to if the student could get enough service. The IEP team, with the exception of the parent, agreed that a Federal Setting III SPAN program was the appropriate placement. The parent discussed homeschooling the student the following year in lieu of a SPAN placement.[76]

53. The next day the district delivered to the parent a proposed IEP dated April 25, 2005, which called for a Federal Setting 8 homebound placement with 15 hours of service per week for the duration of the school year.[77] The district also delivered a Notice of Educational Re-Evaluation to determine the student's current level of function for speech sound production. The district believed the student had met her communication objectives. The Notice of District's Proposed Action notified the parent that the student's IEP would be changed as noted unless she objected within 14 days.[78]

54. No homebound instruction was provided during the period of suspension, but the district did send homework home for the student to complete

---

[75] D 15-16.
[76] D 139-41.
[77] D 637.
[78] D 634, D633, D 643.

there.[79] The district considered her absence through May 2, 2005, to be excused absences while attempting to achieve the homebound placement.[80] On that date, the parent notified the district that she would not agree to homebound placement.[81]

55. The student returned to school on May 3, 2005. When she arrived, school administrators informed her that she would be subject to a search each morning to ensure that she did not bring a weapon to school.[82] The student called her parent, who arrived to watch the search being conducted. The search was conducted by the school social worker in a private setting. The student was asked to remove her socks and shoes and to turn her pockets inside out. The student was then asked to remove all items in her backpack so the social worker could determine there were no weapons in the backpack. The social worker did not touch or "pat search" the student and did not ask the student to remove any clothing except for her jacket or sweatshirt worn over other clothing.[83]

56. After observing the search, the parent took the student home and kept her home through May 10, 2005, because she did not want the student to be searched.[84] The district issued a Compulsory Attendance letter advising the parent that it these

---

[79] Tr. 2:196.
[80] Tr. 1:235.
[81] D 630.
[82] D 630, 605.
[83] D 605; Tr. 1:204-05; 2:433-34.
[84] Tr. 2:377.

absences were not excused and could result in truancy proceedings.[85] The student thereafter returned to school and was similarly searched each morning beginning May 11, 2005. No weapons were found during any searches. The student cooperated with the procedure, and she did reasonably well at school.

57. Because of her suspension and subsequent absence from school, the social worker from Olson Middle School was not able to complete the provision of compensatory education minutes as agreed in the mediation. When the student finally returned to school, the social worker no longer had time in his schedule to provide the service. The student is still owed 330 minutes of compensatory behavior minutes pursuant to the mediation agreement.[86]

58. After the student returned to school, the district stopped providing speech services based on the results of its re-evaluation, which showed the student had achieved her speech goals.[87] The parent did not receive any prior written notice that these services would be discontinued.[88]

59. In early June 2005, the student was the subject of a sexual assault outside of school.[89] She missed several days of school at the end of the year as a result.[90] She did attend a district summer school

---

[85] D 630; D 603.
[86] D 1-4.
[87] Tr. 2:195.
[88] Tr. 2:323-24.
[89] D 705 at 1.
[90] D 706, 709.

program.[91]

. The Independent Evaluations

60. The parties agreed to an IEE by Cynthia Spicuzza, a pediatric neuropsychologist. Dr. Spicuzza first completed a review of the student's education record, then recommended additional testing. When Dr. Spicuzza interviewed the parent in July 2005, the parent advocated that the district should resume speech services and continue with small-group academic instruction at W. Harry Davis Academy. The parent further indicated that the student's behavior at W. Harry Davis Academy was appropriate.[92]

61. Dr. Spicuzza's testing disclosed that the student has normal verbal reasoning abilities, good verbal learning and memory skills, normal visual memory skills, good verbal fluency, good simple mental flexibility, and normal deductive reasoning. Her cognitive limitations, however, are significant and include borderline impaired perceptual abilities, very impaired sustained attention and impulse control, and borderline to moderate impairments in working memory, sustained processing speed, complex visual planning, abstract/conceptual reasoning and conceptual flexibility, verbal response speed and accuracy when impulse control and mental flexibility are required. The student's academic achievement is generally consistent with her cognitive abilities, and she does not have a learning

---

[91] Student's Ex. 213.

[92] D 705 at 3.

disability. Dr. Spicuzza diagnosed a conduct disorder, significant attention deficit hyperactivity disorder (ADHD), and significant emotional health issues. She concluded that the behaviors reflecting these impairments are unlikely to remit and probably require a more restrictive federal setting. In addition, she recommended programs using a token economy may not be effective with the student because of her tendency to perseverate and her inability to change behavioral course when she is out of control. She recommended offering offering frequent breaks during academic tasks and social skills instruction. Other suggestions were to avoid mainstream education until better behavioral control was achieved; reduce the student's workload appropriately but challenge her academically, given her generally adequate rate of achievement; break down tasks into steps; provide greater organizational support; allow more time on tests; provide simple written outlines and note-taking support; and attempt to maintain her interest in academics with hands-on activities.[93]

62. The FBA completed by Janice Ostrom recommended use of a differential reinforcement strategy aimed at ignoring negative behaviors and reinforcing positive behaviors; placement in a small, highly structured and supervised classroom in a more restrictive federal setting; and techniques for increasing her engagement in academics, including hands-on activities and modifying instructional materials to her academic level. In addition, the FBA

---

[93] D 705 at 7-9.

recommends use of a mentor or group of mentors for direct support of social skills. Finally, the FBA recommends revisions to the student's existing behavior plan to more specifically identify strategies to prompt the student to leave difficult social situations and use of a core team process.[94]

Placement Options

63. The district initially recommended placement in the Jordan Park SPAN program, which has approximately 48 students in classes of eight to 12 students each, depending on enrollment. The students rotate between classes for different subjects. A licensed special education teacher is assigned to each class, along with two aides. Students have the opportunity to earn mainstream contact in general education classes at the school by earning points on a level system, which also determines the availability of other privileges. Social skills instruction is provided throughout the day, and behavior is monitored closely with a behavior tracking sheet.[95] As with most Setting III and IV EBD programs, the number of boys far exceeds the number of girls.

64. According to the student's social worker, the student places herself at risk for conflicts and victimization by "running her mouth" to boys and girls alike and by making sexual physical overtures and graphic sexual comments to boys. She typically is drawn to boys with a tough reputation and becomes obsessed with them to the point of annoying them.

---

[94] Student's Ex. 213.

[95] Tr. 1:88-90.

However, she also has made unwanted advances to boys who are more immature and physically smaller than she is. She has never been able to form lasting friendships with girls.[96] Because the social worker agreed with the parent that the student likely would continue to show significant problems in programs that are disproportionately comprised of behaviorally troubled boys, the IEP team agreed in January 20, 2005, that the Jordan Park SPAN program was not an appropriate placement.[97] Nonetheless, the district continued to propose IEPs to the parent calling for placement in the Jordan Park SPAN program because there were no openings in the other district program located at Barton Open School. The district did not consider any programs outside the district until the IEP meeting of August 8, 2005.

65. The SPAN program at Barton Open is structured similarly to the Jordan Park program, except that it is much smaller. There is only one class of eight to 12 students, who are typically girls. There is an opening at the Barton Open SPAN program at this time.[98]

66. Intermediate District 287 offers a program called STRIVE, which is a middle school program for students who are both developmentally or cognitively delayed (DCD) and eligible under EBD criteria. This is a Setting IV program, which means the program is located in a facility separate from any mainstream students. There would be no opportunity for students

---

[96] D 705 at 3-4.
[97] D 193.
[98] Tr. 2:520-22.

in this program to have mainstream contacts during the school day.[99]

67. The social worker who is most familiar with the student believes that the Barton Open SPAN program could be an appropriate placement, depending on the how the IEP is structured.[100] In addition, it would benefit the student to have the opportunity for mainstream contacts and friendships after her behavior has stabilized.[101]

68. Dr. Spicuzza and Janice Ostrom have not made specific recommendations for a particular program, but believe that either a Setting III or Setting IV program might be appropriate depending on the program and the IEP.[102]

Effect of Suspensions

69. The repeated suspensions of the student in the 2004-05 school year have not functioned to teach the student anything about changing or improving her behavior.[103] The BIP in effect since December 2004 has not been effective in changing or improving the student's behavior, and the number of changes and suspensions have had an adverse effect on the student's education.[104]

Procedural Findings

---

[99] Tr. 1:119.
[100] Tr. 1:117-20; 2:473.
[101] Tr. 1:122, 3:608, 681, 713.
[102] Tr. 3:603, 605-06, 658, 671.
[103] Tr. 1:163, 3:651.
[104] Tr. 1:149, 3:616, 716.

70. The Department of Education received the student's request for a due process hearing on May 16, 2005. On May 17, 2005, the Department appointed the undersigned Administrative Law Judge to serve as the Independent Hearing Officer.

71. Prehearing conferences were held by telephone conference call on May 23, 2005, and June 13, 2005.

Extension of Decision Date

72. The original decision date in this case was June 30, 2005. To accommodate Dr. Spicuzza's record review, the parties jointly requested an extension of the due date through July 15, 2005. On July 8, 2005, they agreed to an additional extension of the due date to August 12, 2005, to allow for further testing by Dr. Spicuzza. These extensions were granted for good cause.

73. At the conclusion of the hearing on August 12, 2005, the parties agreed to an additional extension of the decision date to September 1, 2005, to allow time to review the transcript, submit post-hearing memoranda, and writing of the Decision. The extension was granted for good cause.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge, the School District, and the Commissioner of Education have jurisdiction in this matter pursuant to Minn. Stat. §§

14.55 and 125A.091, subd. 12, and Minn. R. 3525.4300.

2. The request for hearing in this matter was proper in form and content, and the School District has complied with the relevant procedural requirements relating to the due process hearing.

3. The Minneapolis Public Schools was, at all times material hereto, the district of residence for the Student and had the primary responsibility for providing an appropriate program of special education for the student.

4. The Student is a 14-year-old child with disabilities as defined in Minn. Stat. § 125A.02 and 20 U.S.C. § 1401(3), who is entitled to special education services appropriate to her needs pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq., and regulations promulgated thereunder, and Minn. Stat. Chapter 125A and rules issued thereunder.

5. The IDEA specifies that, in order to receive federal funds, the state must show that all children with disabilities are assured the right to a free appropriate public education." 20 U.S.C. § 1412(a)(1). The term "free appropriate public education" is defined in the IDEA to mean "special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational

agency;

(C) include an appropriate preschool, elementary or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under Sec. 614(d).

20 U.S.C. §1401(8). To this end, Minn. Stat. § 125A.08(a)(1), in pertinent part, requires all school districts to ensure that "all students with disabilities are provided the special instruction and services which are appropriate to their needs."

6. The United States Supreme Court determined in *Board of Education v. Rowley*[105] that a free appropriate public education "consists of education instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Under the Rowley analysis, a school district provides a child with FAPE when it (1) substantially complies with the procedures set forth in the law; and (2) creates an IEP that is reasonably calculated to enable the student to receive educational benefit.

7. Under Minn. Stat. § 125A.091, subd. 16, the burden of proof is on the School District to demonstrate by a preponderance of the evidence that it is complying with the law and offered or provided a free appropriate public education to the Student in

[105] 458 U.S. 175, 188-89 (1982).

the least restrictive environment.

8. IDEA requires that during the pendency of any proceedings, unless the district and the parent otherwise agree, the student is to remain in the then-current educational placement until all such proceedings have been completed.[106] School personnel may order a change in the placement of a child with a disability for not more than ten consecutive school days to the extent such discipline would be applied to children without disabilities, and additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement under 34 C.F.R. § 300.519.[107]

9. A change of placement occurs if the removal from school is for more than ten consecutive school days, or if the child is subjected to a series of removals that constitute a pattern because they cumulate to more than ten school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another.[108]

10. Because the disciplinary records for the 2003-04 year are not complete, it cannot be determined whether the suspensions that occurred in the spring of 2004 constituted a pattern amounting to

---

[106] 20 U.S.C. § 1415(j).
[107] *Id.*, § 1415(k); 34 C.F. R. § 300.510.
[108] 34 C.F.R. § 300.519.

a change of placement.

11. The student was suspended for approximately 38 days during the 2004-05 school year. The repeated suspensions of the student for periods of less than ten days between January 2005 and April 2005 constitute a pattern because they cumulate to approximately 30 days and because of the length of each removal, the total amount of time the student was removed, and the proximity of the removals to one another. These repeated suspensions constitute a change of placement made by the district without the consent of the parent, in violation of 20 U.S.C. § 1415(j).

12. After a child with a disability has been removed from his or her current placement for more than ten school days in the same school year, during any subsequent days of removal the district must provide services to the extent required by 34 C.F.R. § 300.121(d). The district must provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP.[109] School personnel, in consultation with the child's special education teacher shall determine the extent to which services are necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out I the child's IEP.[110]

13. The student did not receive any homebound instruction during any period of

---

[109] 34 C.F.R. § 300.121(d)(2)(i).

[110] *Id.* § 300.121(d)(3)(i).

suspension between January 2005 and April 2005. Sending work home to be completed by the student, without instruction, is not homebound instruction.

14. IDEA requires that school districts ensure that a re-evaluation of a child with a disability is conducted if conditions warrant a re-evaluation, or if the child's parent or teacher requests a re-evaluation, but at least once every three years.[111]

15. The district conducted appropriate re-evaluations of the student in November 2003 and December 2004 in compliance with IDEA.

16. IDEA requires that school districts ensure that the IEP team reviews and revises the student's education program periodically, but not less than annually, to determine whether the child's annual goals are being achieved, and to revise the IEP as appropriate to address any lack of expected progress toward the annual goals and in the general curriculum, where appropriate.[112]

17. The district failed to review and revise the student's IEP appropriately to address her lack of progress in March of 2004, when the student was transferred from Lucy Laney to Olson Middle School, and between January 2005-April 2005.

18. IDEA requires school districts to ensure that IEP teams consider input from the parents in re-evaluating the student.[113]

---

[111] 20 U.S.C. § 1414(a)(2)(A).
[112] 20 U.S.C. § 1414(d)(4).
[113] 20 U.S.C. § 1414(c)(1)(a).

19. The district appropriately considered the parent's input in conducting its re-evaluations of the student.

20. School districts shall obtain informed parental consent before conducting any re-evaluation of a child with a disability, except that such informed parental consent need not be obtained if the district can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent failed to respond.[114]

21. The district obtained informed parental consent, or took reasonable measures to obtain such consent, before conducting re-evaluations of the student. The district sent the parent a Notice of Re-Evaluation concerning speech services, and the parent did not respond to it, so the district was entitled to proceed.

22. School districts are required to ensure that parents receive written prior notice when the district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child.[115]

23. The district failed to provide the parent with written prior notice before eliminating the student's speech services, in violation of 20 U.S.C. § 1415(b)(3).

24. School districts are required to have in

---

[114] 20 U.S.C. § 1414(c)(3).

[115] 20 U.S.C. 1415(b)(3).

effect an IEP at the beginning of each school year.[116]

25. The school district had an IEP in place at the beginning of each school year as required by IDEA.

26. To the maximum extent appropriate, children with disabilities are to be educated with children who are not disabled and are to be removed from the regular educational environment only when the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[117]

27. In recommending that the student be placed in a Setting III SPAN program, the district did not fail to provide the student with the necessary supplementary aids and services in the least restrictive environment.

28. The district has proved by a preponderance of the evidence that the student requires placement in a Setting III program; however, the IEP proposed by the district March 9, 2004, does not provide the student with FAPE because it calls for placement in a specific program that the IEP team had already determined was not appropriate for the student and because it requires that the student will continue to be subject to the discipline policies that resulted in an improper change of placement. To this extent the IEP is not reasonably calculated to achieve educational

---

[116] 20 U.S.C. §1414(d)(2).
[117] 20 U.S.C. § 1412(a)(5).

benefit.

29. The Barton Open SPAN program is the least restrictive environment for the student at this time.

Minn. R. 3525.1400 requires classrooms and other facilities in which pupils receive instruction, related services, and supplementary aids and services shall be essentially equivalent to the regular education program; provide an atmosphere that is conducive to learning; and meet the pupils' special physical, sensory, and emotional needs.

31. The classrooms and facilities provided by the district provided an atmosphere conducive to learning.

32. A hearing officer may require the resident school district to provide compensatory educational services to the child if the hearing officer finds that the school district has not offered or made available to the child a free appropriate public education and that the child has suffered a loss of educational benefit. Such services shall take the form of direct and indirect special education and related services designed to address any loss of educational benefit that may have occurred. The hearing officer's finding shall be based on a present determination of whether the child has suffered a loss of educational benefit.[118]

33. The district's denial of FAPE has caused a loss of educational benefit to the student. Compensatory educational services are required to

---

[118] Minn. Stat. § 125A.09, subd.

address this loss of educational benefit.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

DECISION

1. The school district shall convene the student's IEP team as soon as possible to develop an IEP based on current data concerning the student's present levels of performance and containing goals and objectives consistent with the recommendations made by Dr. Spicuzza and Janice Ostrom. The IEP shall not combine all service minutes as minutes of EBD service, but shall identify minutes of service in the areas corresponding to the student's goals and objectives;

2. The school district shall retain Janice Ostrom to consult with the IEP team to revise the student's BIP. The BIP shall provide that the city-wide disciplinary policy may be modified as determined by the IEP team;

3. In the absence of an agreement between the parties as to a different Setting III placement, the student's placement shall be at the SPAN program at Barton Open School;

4. The student is entitled to compensatory education services in the amount of 20 hours for the 2003-04 school year and 168 hours for the 2004-05 school years. In addition, the

student is entitled to 330 minutes of compensatory services as a result of the mediation agreement. The student's IEP team shall decide when and how those services will be delivered to the student.

Dated: September 1, 2005.

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge
612/341-7602

Reported: Transcript prepared, three volumes.

MEMORANDUM

The district maintains that by enrolling the student in the Col. Young Military Academy, before enrolling back in the district, the parent has waived all claims under IDEA for the time before September 27, 2004.

Under IDEA, a parent of a child with a disability must have an opportunity to present complaints with respect to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."[119] When a complaint has been received, the parent must have an opportunity for an impartial due process hearing, which shall be conducted by the state educational agency or by the local educational agency, as determined by state law

[119] 20 U.S.C. § 1415(b)(6).

or by the state educational agency.[120]

Under Minnesota law, every school district is obligated to provide special instruction and services for children with a disability who are residents of the district.[121] Charter schools are public schools that are part of the state system of education; although they are exempt from certain other requirements applicable to school districts, charter schools are obligated to provide special education services to disabled students as though they were a school district.[122] Both a parent and a district are entitled to an impartial due process hearing conducted by the state when a dispute arises over the provision of FAPE to a child with a disability. The hearing must be held in the district responsible for ensuring that a free appropriate public education is provided according to state and federal law.[123]

In *Thompson*, the parent removed the student from a school in the Minneapolis district and enrolled him in a charter school. Approximately six months later, the parent requested a due process hearing to challenge the Minneapolis district's provision of FAPE. The child was not a student in the Minneapolis district at the time the hearing was requested. The hearing officer dismissed the request for hearing because Thompson no longer attended a

---

[120] *Id.*, § 1415(f)(1).

[121] Minn. Stat. § 125A.03(a). See also Minn. R. 3525.0800, subp. 1 (a pupil's district of residence is responsible for assuring that an appropriate program is provided for all eligible pupils).

[122] Minn. Stat. § 124D.10, subds. 10, 12.

[123] Minn. Stat. § 125A.091, subds. 12.

school within the district; the hearing review officer affirmed that decision. The federal district court similarly dismissed the subsequently filed federal action, and the Eighth Circuit affirmed. In its decision, the court described the statutory framework authorizing due process hearings, noting that [at that time] state law provided that a due process hearing is to be initiated and conducted by the school district responsible for assuring that an appropriate program is provided in accordance with state board rules.[124] The court then held that:

> Thompson has not stated a cause of action under IDEA because his request for a review comes after he left the District previously responsible for his education. . . . IDEA provides a mechanism for challenging the education a student has been provided within a school district. If a student changes school districts and does not request a due process hearing, his or her right to challenge prior educational services is not preserved. Subsequent challenges to the student's previous education become moot because the new school district is responsible for providing a due process hearing.[125]

In *Smith v. Special Sch. Dist. No. 1*,[126], the

---

[124] Minn. Stat. § 120.17, subd. 3b(e) (1996), renumbered as 125A.09, subd. 6 (1998), amended and recodified as Minn. Stat. § 125A.091, subd. 12 (see Minn. Laws 2003, 1st Sp., ch. 9, art. 3, § 9). 125143 F.3d at 578-79.

[125] 143 F.3d at 578-79.

[126] 184 F.3d 764 (8th Cir. 1999).

Eighth Circuit addressed a similar scenario. The student moved from the Minneapolis school district to Bloomington, then requested a due process hearing against both districts. The Minneapolis district moved for dismissal on the basis that the student's resident district was Bloomington, not Minneapolis. Although a hearing officer denied a motion to dismiss, a review officer granted it, and the federal district court subsequently dismissed the IDEA claim on those grounds. The Eighth Circuit affirmed the dismissal in reliance on Thompson.[127]

More recently, the Eighth Circuit reaffirmed *Thompson*, and its opinion in *M.P. v. Ind. Sch. Dist. No. 721128* provides further clarification of the legal rationale. In *M.P.*, the student attended schools in the New Prague school district, which concluded the student was not eligible for special education services despite his medical diagnosis of schizophrenia. After a protracted period of harassment by his peers in the district, following the inappropriate disclosure of the student's medical diagnosis by district personnel, the parents removed the student from New Prague schools and open-enrolled him in a neighboring district's high school. Because the parents still lived in New Prague, the New Prague school district refused to provide transportation to the Northfield district. When the parents requested a hearing against the New Prague district, the hearing officer dismissed it, and the hearing review officer affirmed. The federal district court dismissed the IDEA claim on summary judgment because the student was no longer enrolled in the New Prague school district. On

---

[127] *Smith*, 184 F.3d at 767-68.

appeal, the Eighth Circuit said:

> The issue before us is whether M.P. is entitled to compensatory educational services from the New Prague School District under the IDEA even though his parents failed to exhaust his administrative remedies by requesting a due process hearing while he was still enrolled in that school district. Under Thompson v. Bd. of the Special Sch. Dist. No. 1, 144 F.3d 574 (81h Cir. 1998), M.P.'s IDEA claim must fail. This court held in Thompson that "[i]f a student changes school districts and does not request a due process hearing, his or her right to challenge prior educational services is not preserved. Subsequent challenges to the student's previous education become moot because the new school district is responsible for providing a due process hearing." Id. at 579. M.P.'s parents did not request a due process hearing until after they enrolled M.P. in the Northfield public schools.[129]

The district argues that under Thompson, Smith, and M.P. a student waives his or her right to challenge past educational services by leaving the district without initiating a due process hearing.

---

[129] M.P., 326 F.3d at 980. See also id. at 981 (quoting N.B. v. Alachua County Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996) ("If parents can bypass the exhaustion requirement of the IDEA by merely moving their child out of the defendant school district, the whole administrative scheme established by the IDEA would be rendered nugatory.")).

Those cases do not address the situation where the student moves back into the district after a short period of enrollment in a charter school, and remains in the district through the time a hearing is requested. In Thompson, Smith, and M.P., the Eighth Circuit simply pointed out that the district named in the request for due process no longer had an obligation to provide a hearing. The student could have preserved his right to a hearing by requesting a due process hearing before changing districts. The cases were decided not on the basis that the student waived the right to challenge past services by changing districts without requesting a due process hearing, but on the statutory basis that the student may only request a due process hearing, and thereby exhaust administrative remedies, from the district that is obligated to provide the student with an appropriate education.

Here, the student re-enrolled in the district after attending a charter school for three weeks. The district was responsible for educating this student appropriately both before the due process hearing was requested and at the time the due process hearing was requested, and it remains responsible for educating her now.

The district also maintains that any and all claims the student had for denial of FAPE prior to the mediation were resolved there, and only claims arising after March 28, 2005, should be considered here. The mediation "agreement," by its own terms, is incomplete. In addition, it does not address the issues for which compensatory relief is provided in this Decision. The district's failure to adequately review

and revise the student's IEP in March 2004, and the impact of the serial suspensions on the student's education in the 2004-05 school year was not a subject of the mediation, and the parent did not waive her right to compensatory education for those denials of FAPE by failing to raise those issues in the mediation.

If the district had reviewed the student's IEP and revised it appropriately, and specified why the setting at Lucy Laney was inappropriate in March 2004 instead of administratively transferring the student to Olson, the student might have been in an appropriate placement much earlier and would not have lost all of those days in school due to suspensions. This failure caused a loss of educational benefit to the student, but the compensatory remedy is not easily captured. In the fall of 2004, the student's IEP called for approximately 120 minutes of special education services per day. The loss of ten days of school would translate to about 20 hours of special education, and that is what the Administrative Law Judge has ordered for the 2003-04 school year.

It is easier to calculate days and hours for the 2004-05 school year. According to the district's special education staff, the district should have considered Setting III program alternatives outside the district in January 2005, when the IEP team determined that the Jordan Park SPAN placement was not appropriate.[130] Instead of examining alternatives outside the district, the district persisted in offering

---

[130] Tr. 2:555-56.

the parent a program the team had already determined was not appropriate and to which the parent could not agree. Accordingly, the student is awarded 168 hours of compensatory education services (28 days times 360 minutes per day that would have been available in a Setting III program) for the 2004-05 school year.

Part of the parent's confusion about the amount of and focus on academic instruction at the Barton SPAN program is the result of the collapse of all service minutes into 360 EBD minutes on the proposed IEP of March 9, 2005. Students in Setting III EBD placements receive EBD service for 360 minutes per day, in addition to minutes of academic instruction, unless they are allowed to participate in mainstream classes. It is easier to write the minutes as 360 EBD minutes for this reason; however, an IEP that separates out service minutes by goal could be written.[131] The district proposed this approach in the draft IEP discussed in the August 5, 2005 IEP meeting,[132] and in the interests of eliminating this confusion the Administrative Law Judge is directing the district to continue with that approach.

K.D.S.

---

[131] Tr. 2:525-29.

[132] D 732.